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# Criminal Justice Federalism and National Sex Offender Policy

Wayne A. Logan\*

## I. INTRODUCTION

“[A]ll crime,” Justice Potter Stewart once observed, “is a national problem.”<sup>1</sup> To the extent this assessment is accurate, it poses special difficulty for a federalist system such as ours, which reposes main police power authority in the states, not the national government, and has traditionally favored a decentralized approach to governance. In recent decades, however, nationalism has largely trumped federalism concerns, as Congress and the President have federalized a broad range of criminal misconduct previously the exclusive province of states. The effort, as students of the field are well aware, has inspired extensive critical commentary<sup>2</sup> and two recent Supreme Court decisions overturning federal laws.<sup>3</sup>

The proliferation of federal criminal laws, however, is only part of the federalization story; indeed, in practical terms, only a small part. Because the U.S. can prosecute and punish only a small fraction of the nation’s criminal offenders, recent federalization efforts have had largely symbolic importance.<sup>4</sup> Moreover, while the unfairness to defendants disadvantaged when their cases “go federal” is

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<sup>1</sup> *Perez v. United States*, 402 U.S. 146, 157 (1971) (Stewart, J., dissenting).

<sup>2</sup> For a representative sampling see, for example, Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673 (1999); Kathleen Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

<sup>3</sup> See *United States v. Morrison*, 529 U.S. 598, 602 (2000) (invalidating a federal law allowing civil damages for victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating a federal law criminalizing the possession or use of a firearm in or near a school).

<sup>4</sup> See Susan R. Klein, *Independent-Norm Federalism*, 90 CAL. L. REV. 1541, 1555-56 n.71 (2002); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 844 (2006).

not to be minimized,<sup>5</sup> such impact is limited to individual cases actually channeled into the federal system.

This Article focuses on a species of federalization of a much broader kind: the nationwide imposition by the federal government of a criminal justice policy relating to sex offender registration and community notification. State registration and notification laws, now in effect nationwide and affecting the daily lives of over 600,000 individuals, and having major resource-related impact on the states, are the direct result of federal initiative and preference. The federal government has achieved its goal not by imposing its will straightforwardly on states via the Commerce Clause, which has provoked such consternation in federalization debates, but rather more subtly through its conditional Spending Power authority. The strategic use of honey, not vinegar, has proved a marked success and been met with silence from the courts, serving to “fasten on the States federal notions of criminal justice” in a massive way.<sup>6</sup>

The story of how the federal government achieved this success, and the consequences it has had, will be examined in the following pages.<sup>7</sup> The Article first provides an overview of the increasing federal involvement in criminal justice matters over time, then surveys federal efforts since 1994 to enact registration and community notification laws in particular, culminating with enactment of the Adam Walsh Act in 2006. Passed by voice votes in both the House and Senate, and quickly signed by the president, the Walsh Act marks a zenith in federal intrusiveness, containing an unprecedented array of exacting registration and notification requirements for states to adopt. The law seeks to create a uniform national regime and was motivated by congressional concern over the perceived “patchwork” of “weak” state laws containing “loopholes” permitting individuals to evade registration and notification. These suppositions, however, do not withstand empirical scrutiny, and, even more fundamentally, are themselves predicated on an as yet empirically unsubstantiated faith in the efficacy and effects of registration and notification. Despite this uncertainty, the U.S. has forged ahead, unreservedly imposing a comprehensive national regime.

The Walsh Act and predecessor federal laws dating back to 1994 have had a major impact on states (and their residents) and serious implications for constitutional federalism. Part III examines the significant federalism consequences of the extended federal campaign to impose upon states national registration and notification policy, and how and why the effort has failed to

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<sup>5</sup> See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997).

<sup>6</sup> *Duncan v. Louisiana*, 391 U.S. 145, 173 (1968) (Harlan, J., dissenting).

<sup>7</sup> For a fuller treatment of registration and community notification laws, which originated in municipal provisions enacted in the early 1930s to monitor emigrant “gangsters,” see WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* (Stanford Univ. Press) (forthcoming 2009).

prompt resistance. Doctrinal concerns over federalism, persuasive as they may be, however, fail to resolve the instrumental question of the relative utility of the federal government in the policy formation process. As a result, Part IV considers the suitability of Congress as a central planner of criminal justice policy, and presuming the continued determination of the U.S. to play a central role, the nature and form it should take.

## II. FEDERAL INVOLVEMENT

### A. Overview

By constitutional design and tradition, the mission of the federal government in regulating the well-being and safety of its citizenry is highly circumscribed. The U.S. is bestowed with the “few and defined” areas of authority prescribed in the Constitution<sup>8</sup> and the Tenth Amendment “reserve[s]” the balance of such authority to states.<sup>9</sup> Included in this state reservoir is the police power, an expansive authority James Madison regarded as extending “to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .”<sup>10</sup>

For much of the nation’s history, this demarcation prevailed, with the federal government exercising restraint relative to its police power authority and the states defending their prerogative. This changed, however, in the decades following the Civil War with what Lawrence Friedman has termed the “culture of mobility,” fostered by the increasing availability of automobiles and railroads, which made state boundaries “increasingly porous” and conducive to inter-state criminal misconduct.<sup>11</sup> Believing the states ill-equipped to address this shift, Congress

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<sup>8</sup> *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (Marshall, C.J.); *see also* *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (noting “that immense mass of legislation” that states had “not surrendered to the general government”). The Constitution grants the federal government explicit authority only relative to counterfeiting, piracy, military crimes, crimes against the law of nations, and treason. *See* U.S. CONST. art. I, §§ 3, 8.

<sup>9</sup> *See* U.S. CONST. amend. X (providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *see also* *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (“Under our federal system, the ‘States possess primary authority for defining and enforcing the criminal law.’”); *Screws v. United States*, 325 U.S. 91, 109 (1945) (“Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.”).

<sup>10</sup> THE FEDERALIST NO. 45, at 260–61 (James Madison) (Clinton Rossiter ed., 1961); *see also* *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 661 (1885) (recognizing that “there is a power, sometimes called the police power, . . . upon the proper exercise of which . . . may depend the public health, the public morals, or the public safety. . .”).

<sup>11</sup> LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 209, 263 (1993).

expanded the reach of federal criminal law jurisdiction beyond that specifically enumerated in the Constitution. Although initially focusing on the need to control monopolies, lotteries, and the interstate transport of diseased animals, federal jurisdiction soon expanded to the interstate transport of females for immoral purposes (Mann Act, 1910), narcotics (Harrison Act, 1914), kidnapping (Lindbergh Kidnapping Act, 1932), transporting stolen vehicles across state lines (Dyer Act, 1919), and racketeering (Hobbs Anti-Racketeering Act, 1934).<sup>12</sup> Most significant, in 1919, as a result of adoption of the Eighteenth Amendment and the Volstead Act,<sup>13</sup> the federal government outlawed the manufacture, sale or transport of alcohol.

By and large, however, for much of the first half of the twentieth century criminal justice remained a state and local concern, and the federal impact on criminal justice matters remained limited and episodic.<sup>14</sup> Indeed, while President Herbert Hoover is generally credited with first characterizing crime as a national political issue in his 1929 inaugural address,<sup>15</sup> Hoover himself—consistent with tradition—conceived of the federal crime control role as being highly circumscribed. While urging a “war” on “gangsters,” for instance, Hoover insisted that the federal government lacked authority to intervene and that the states themselves step up enforcement of their own laws.<sup>16</sup>

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<sup>12</sup> Technically, the Mail Fraud Statute, enacted in 1872, constituted the first U.S. incursion on states’ criminal jurisdiction, yet it was predicated on the enumerated power of Congress to establish post offices. See Brickey, *supra* note 2, at 1142.

<sup>13</sup> See generally RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920*, at chs. 6–7 (1995) (chronicling the constitutional debate over Prohibition).

<sup>14</sup> This was not to say that federal intrusion was without impact on the federal criminal justice system. In 1932, for instance, the number of federal criminal cases peaked as a result of Prohibition-era alcohol cases, increasing by more than two and one-half times the volume of federal cases before Prohibition. See Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 *LAW & CONTEMP. PROBS.* 494, 497 tbl.1 (1934).

<sup>15</sup> FRIEDMAN, *supra* note 11, at 273. Hoover followed up by proposing establishment of a federal commission to study the national implications of crime, which in 1931 resulted in the publication of a fourteen-volume report under the auspices of the Wickersham Commission. *Id.* at 273–74. For more on the seminal role of Hoover in nationalizing concern over crime see JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY: HERBERT HOOVER’S INITIATIVES* (1993).

<sup>16</sup> *President Demands War on Gangsters; Puts Duty on States: Calls for ‘Awakening to Failure of Some Local Governments to Protect Their Citizens,’* N.Y. TIMES, Nov. 26, 1930, at 1. The same sentiment of federal restraint was voiced by his Attorney General, William DeWitt Mitchell, who emphasized that

[d]ealing with organized crime . . . is largely a local problem . . . [T]he fact that these criminal gangs incidentally violate some federal statute does not place the primary duty and responsibility of punishing them upon the Federal Government, and until state police and magistrates, stimulated by public opinion, take hold of this problem, it will not be solved.

Even the hugely popular Lindbergh Kidnapping Act, enacted in the wake of the abduction and murder of aviator Charles Lindbergh's child, a crime one newspaper called "a challenge to the whole order of the nation,"<sup>17</sup> was resisted out of concern that the federal government was intruding on state prerogative. As Representative Earl Michener (R-MI) remarked on the House floor, the tragedy "must not become a precedent for more legislation giving the Federal Government concurrent authority with the States in enforcing police regulations and laws dealing with matters in which the States are primarily interested, and which can be properly dealt with by State action."<sup>18</sup> Similarly, J. Edgar Hoover, who assumed leadership of the Federal Bureau of Investigation in 1924, repeatedly rebuffed congressional efforts to expand federal criminal law authority, echoing the long-held aversion for a "national police force."<sup>19</sup>

In the wake of the 1964 presidential campaign, in which Republican challenger Barry Goldwater's focus on "violence in the streets" propelled criminal justice to national attention, federal reluctance to law-make on criminal justice matters receded.<sup>20</sup> During the Johnson and Nixon administrations, amid unprecedented high rates of violent crime,<sup>21</sup> Congress enacted a series of omnibus bills that vastly expanded the scope of federal criminal law, targeting firearms and narcotics in particular.<sup>22</sup>

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HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 478 (1937).

<sup>17</sup> RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 175 (1987); see also Horace L. Bomar, Jr., *The Lindbergh Law*, 1 *LAW & CONTEMP. PROBS.* 435, 436 (1934) ("Public sentiment having been aroused by this atrocious deed, there was an instant demand that Congress 'do something' about it.").

<sup>18</sup> See 75 CONG. REC. H13,283 (June 17, 1932) (statement of Rep. Michener). Hoover also opposed using the case as a basis for extending federal criminal justice authority. CALDER, *supra* note 15, at 201.

<sup>19</sup> SANFORD J. UNGAR, *FBI* 79 (1976); see also Phillip B. Heyman & Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, 543 *ANNALS AM. ACAD. POLS. & SOC. SCI.* 103, 108 (1996) (noting historic anxiety of national police force); TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, *REPORT ON THE FEDERALIZATION OF CRIMINAL LAW* 27 (1998) ("Historically, centralization of criminal law enforcement power in the federal government has been perceived as creating potentially dangerous consequences and has therefore been avoided.").

<sup>20</sup> On this national political shift more generally see TED GEST, *CRIME AND POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW & ORDER* (2001); NANCY E. MARION, *A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993* (1994).

<sup>21</sup> See Corrina B. Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 *U. PA. L. REV.* 1361, 1417-18 (2004).

<sup>22</sup> See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970); Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

In addition to legislation, the federal government came to see a significantly increased role for itself in the administration of criminal justice.<sup>23</sup> The President's Commission on Law Enforcement and Criminal Justice Administration, which in 1967 released its landmark study, *The Challenge of Crime in a Free Society*, figured centrally in this evolution. The Commission offered several justifications for an enhanced federal role. First, the trans-boundary nature of crime and the negative externalities thought associated with the uneven enforcement capacity of states necessitated federal involvement:

[C]rime is a national, as well as a State and local, phenomenon; it often does not respect geographical boundaries. The FBI has demonstrated the high mobility of many criminals. Failure of the criminal justice institutions in one State may endanger the citizens of others....As President Johnson stated in his 1966 Crime Message to Congress: "*Crime does not observe neat, jurisdictional lines between city, State, and Federal Governments . . . . To improve in one part of the country we must improve in all parts.*"<sup>24</sup>

Moreover, individual states, the Commission noted, lacked the wherewithal to pursue the "sweeping and costly changes" necessary to secure a significant nationwide reduction in crime.<sup>25</sup> The superior resources of the federal government were needed to foster the research and experimental efforts prerequisite to this undertaking.

The programmatic initiative the Commission urged, by its own admission "a large one,"<sup>26</sup> was to be undertaken with due sensitivity for the states' preeminent role relative to criminal justice. Rather than dictating policy, federal involvement would entail "support and collaboration"<sup>27</sup> intended to "lead and coordinate change

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<sup>23</sup> In his first message to Congress, President Johnson asserted that the "Federal Government will henceforth take a more meaningful role in meeting the whole spectrum of problems posed by crime," and offered that crime control "is an area in which the solution depends on cooperation from the officials of all the fifty states, and also the President, Attorney General, and the FBI." Johnson, as Nancy Marion notes, described "a new and previously untested cooperative role in crime control between the state and federal governments." MARION, *supra* note 20, at 60.

<sup>24</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 284 (1967).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also *id.* at 283 ("[T]he Federal Government can make a dramatic new contribution to the national effort against crime by greatly expanding its support of the agencies of justice in the States and in the cities.").

<sup>27</sup> See *id.* at 285 ("In proposing a major Federal program against crime, the Commission is mindful of the special importance of avoiding any invasion of State and local responsibility for law enforcement and criminal justice, and its recommendation is based on its judgment that Federal support and collaboration of the sort outlined below are consistent with scrupulous respect for—and indeed strengthening of—that responsibility.").

through providing financial and technical assistance and support of research.”<sup>28</sup> Under the auspices of the Law Enforcement and Assistance Administration (LEAA), created as part of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>29</sup> over time the federal government provided state and local governments \$8 billion in funds.<sup>30</sup> Consistent with ascendant enthusiasm for New Federalism, which emphasized the essential role of states in combating the nation’s social ills,<sup>31</sup> and ongoing congressional concern over federal displacement of state crime control authority more generally,<sup>32</sup> money was disbursed in the form of direct block grants,<sup>33</sup> with the states identifying funding priorities and devising initiatives to handle them.<sup>34</sup> The LEAA, as summarized by Malcolm Feeley and Austin Sarat in their book on the era, had three main functions: (1) oversee the distribution and expenditure of funds to states; (2) sponsor research and demonstration projects; and (3) provide technical assistance to the states.<sup>35</sup> Put more bluntly, in the words of Senator Roman Hruska (R-NE), a chief proponent of the bill creating the agency, the LEAA was a “check writing machine.”<sup>36</sup>

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<sup>28</sup> *Id.* at 301 (“Control of crime and improvement of criminal justice are basically State and local concerns . . . . The role of the Federal Government must be to lead and coordinate change through providing financial and technical assistance and support of research.”).

<sup>29</sup> See generally Robert F. Diegelman, *Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience*, 73 J. CRIM. L. & CRIMINOLOGY 994 (1982).

<sup>30</sup> DOUGLAS McDONALD & PETER FINN, ABT ASSOCS. INC., CRIME AND JUSTICE TRENDS IN THE UNITED STATES DURING THE PAST THREE DECADES 19 (2000).

<sup>31</sup> MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION 42–43 (1980) (“It is the states, the New Federalism suggests, which are both close enough to the citizens to understand their problems yet large enough to be able to effectively deal with them. In contrast, Washington is too remote and local governments too small.”).

<sup>32</sup> See Diegelman, *supra* note 29, at 997 (noting with respect to the origins of the LEAA; “any suggested federal role had to avoid even the slightest appearance that local authority for crime control was being usurped by the federal government.”); Howard E. Peskoe, *The 1968 Safe Streets Act: Congressional Response to the Growing Crime Problem*, 5 COLUM. HUM. RTS. L. REV. 69, 88–90, 110 (1973) (quoting extensive House and Senate debates expressing concern over federal incursion).

<sup>33</sup> Initially, the Johnson Administration proposed grants-in-aid, to be administered by the U.S. Attorney General, who would wield significant discretionary power over the programs to be funded. FEELEY & SARAT, *supra* note 31, at 41–42. Republican resistance soon arose over the method, in part due to law enforcement officials expressing alarm over the prospect of Johnson’s Attorney General (a liberal, Ramsey Clark) dictating local policies. *Id.* The end result of substituting block grants for grants-in-aid was one of making states the dominant player in a partnership role with the federal government. *Id.* at 48–49; see also Peskoe, *supra* note 32, at 88–89.

<sup>34</sup> See Diegelman, *supra* note 29, at 998 (“[t]he states were to select both the recipients and the uses of these grants. The states, not the Congress or the federal government, would make choices, set priorities, and allocate funds.”).

<sup>35</sup> FEELEY & SARAT, *supra* note 31, at 49.

<sup>36</sup> *Id.* at 48.



After sustained criticism over its inefficiency, mismanagement, and failure to achieve tangible crime-reduction results, the LEAA was phased out upon recommendation of President Carter in 1980.<sup>37</sup> The Reagan Administration, while publicly endorsing state criminal justice supremacy, considered federal assistance in the form of grants and contracts an inappropriate use of federal funds.<sup>38</sup> As a result, federal involvement in the 1980s assumed a more passive form, with a cluster of agencies such as the National Institute of Justice, the Bureau of Justice Statistics, and the Bureau of Justice Assistance (all created in 1979) providing federal technical support and expertise.<sup>39</sup> Yet, the political salience of crime control was no more lost on President Reagan than any of his recent White House predecessors. To Reagan, as Daniel Richman has noted, the demise of the LEAA and its largesse “had more to do with fiscal policy than federalism concerns.”<sup>40</sup>

Indeed, the Reagan Administration’s tepid federalism was evidenced in its combined efforts with Congress in the 1980s to dramatically expand federal laws relating to narcotics and firearms.<sup>41</sup> Meanwhile, Congress, acutely aware of several high-profile crimes in states, expanded federal criminal jurisdiction in other areas. Among the most notable instances was the 1992 enactment of a federal anti-carjacking statute, passed after a widely reported case of a Maryland woman who was dragged to death while attempting to rescue her daughter from her stolen car.<sup>42</sup> Even though state authorities successfully prosecuted the perpetrators under Maryland statutory law, and life sentences were imposed, Congress fixated on the lack of U.S. jurisdiction, and quickly passed a new provision;<sup>43</sup> two years later, the law was amended to make fatal carjackings death penalty-eligible.<sup>44</sup>

Despite these developments, during the 1980s and early 1990s Congress continued to fund state anti-crime programs by means of grants. For instance, the Comprehensive Crime Control Act of 1984, enacted shortly after the demise of the LEAA, re-opened the federal money spigot to states (albeit at a rate short of that allocated before).<sup>45</sup> Far more significant were two bills passed in 1990 and 1994. The Crime Control Act of 1990 authorized \$900 million in grants for use in state

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<sup>37</sup> Diegelman, *supra* note 29, at 996.

<sup>38</sup> John J. DiIulio, Jr. et al., *The Federal Role in Crime Control*, in CRIME 445, 455 (James Q. Wilson & Joan Petersilia eds., 1995).

<sup>39</sup> Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 392 (2006).

<sup>40</sup> *Id.* at 393.

<sup>41</sup> *Id.* at 395–97.

<sup>42</sup> GEST, *supra* note 20, at 69.

<sup>43</sup> *Id.*

<sup>44</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 60003(a)(14), 108 Stat. 1796, 1970 (amending 18 U.S.C. § 2119(3)(1988)).

<sup>45</sup> KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 94–95 (1997).

and local anti-crime efforts, disbursed under a program named after a New York City police officer killed in the line of duty in 1988: the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs.<sup>46</sup> The Violent Crime Control and Law Enforcement Act of 1994 authorized allocation of \$30 billion to state and local governments to fight crime.<sup>47</sup>

As the preceding overview suggests, the federal government has over time increasingly involved itself in the nation's crime control efforts, with Congress making liberal use of its Commerce Clause authority to expand its criminal law jurisdiction and invoking its spending power to figure more centrally in state criminal justice systems. However, these latter efforts were largely without impact on substantive law and policy, with the federal government being content to support the states with grants for equipment, planning, and research support.

In 1994, however, Congress also put its spending authority to more coercive use to compel changes in state criminal justice policy. It did so with respect to the community control of convicted sex offenders, a matter unmistakably within the historic purview of states, by coercing state compliance by means of conditional funding demands. And whereas in the past, even as recently as the 1980s in its effort to combat drugs, the federal government at least paid lip service to federalism concerns,<sup>48</sup> in the mid-1990s, with sex offenders, such concern dissipated, giving way to the creation of an unprecedented national criminal justice policy.<sup>49</sup>

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<sup>46</sup> Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, § 6091(a), 102 Stat. 4312, 4329.

<sup>47</sup> JEFFEREY A. ROTH ET AL., U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, NCJ 183643, NATIONAL EVALUATION OF THE COPS PROGRAM-TITLE 1 OF THE 1994 CRIME ACT 41 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183643.pdf>.

<sup>48</sup> See, e.g., DRUG ABUSE POLICY OFFICE, WHITE HOUSE, FEDERAL STRATEGY FOR PREVENTION OF DRUG ABUSE AND DRUG TRAFFICKING 1982, at 3 (1982) ("The 1982 Strategy does not attempt to dictate from a national level the relative priorities for local responses to drug problems."). By 1990, however, one sees a shift in tone, with the White House expecting state adherence to federal policy. See William J. Bennett, *Introduction* to OFFICE OF NAT'L DRUG CONTROL POLICY WHITE PAPER, STATE DRUG CONTROL STATUS REPORT 1, 3 (1990) ("Each State can and should be expected to adopt the laws and policies addressed in this report . . ."). Federal efforts, however, unlike with sex offender registration policy, never got beyond the hortatory during this time.

<sup>49</sup> On the greater coerciveness of federal policy more generally, see John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 139 (1990); Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 PUBLIUS 390, 390-92, 400 (2007). Tim Conlan offers that the relationship has become more "opportunistic" than "coercive," with federal actors pursuing "their immediate interests with little regard for the institutional or collective consequences." Tim Conlan, *From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations*, 66 PUB. ADMIN. REV. 663, 667 (2006); see also Joseph F. Zimmerman, *Congressional Preemption During the George W. Bush Administration*, 37 PUBLIUS 432, 446-47 (2007) (asserting that federal-state relations are more nuanced than descriptions such as "coercive" or "cooperative" convey). Such a view comports with that of Daryl Levinson, who asserts that federal actors are motivated more by the immediate desire to

### B. Federal Registration and Community Notification Legislation

It has become commonplace to conceive of the nation's modern response to sex offenders as stemming from a "moral panic." The phrase, if not the concept, originated with sociologist Stanley Cohen in his 1972 study of the exaggerated response in England to "Mods and Rockers," teenage groups who in the mid-1960s engaged in a series of disturbances in a seaside town. "Societies," Cohen observed, "appear to be subject, every now and then, to periods of moral panic," resulting in the "moral barricades [being] manned by editors, bishops, politicians and other right-thinking people," and drastic solutions proffered.<sup>50</sup> The same phenomenon was observed by criminologist Edwin Sutherland in 1950, in a study of state laws originating in the late 1930s that targeted "sexual psychopaths" for indefinite involuntary civil commitment.<sup>51</sup> More recently, adopting a broader historical framework, Philip Jenkins has identified the nation's recurrent tendency to fixate on sexual abuse (especially of children), dating back a century.<sup>52</sup>

The most recent wave of concern originated in the early 1980s, prompted by the 1981 disappearance of six-year-old Adam Walsh in Hollywood, Florida, which led to a massive two-week search that captivated the nation's attention. After the boy's remains were discovered in a canal, his parents, John and Revere Walsh, initiated a national crusade to "mak[e] the country safe for these little people."<sup>53</sup> Over the next several years, Congress dedicated significant attention to the plight of missing and kidnapped children, allocating millions of dollars to fund the campaign, including creation of the National Center for Missing and Exploited Children, to be headed by John Walsh. By the late 1980s, however, earlier estimates of the 1.5 million missing children were called into question, with studies indicating that the vast majority of children were not "literally missing," but rather were in the company of family members and abductions and killings by strangers were uncommon.<sup>54</sup>

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remain in office than any per se desire for empire-building. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

<sup>50</sup> STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (3d ed. 2002).

<sup>51</sup> Edwin H. Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142, 146–47 (1950).

<sup>52</sup> PHILLIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998). Moral panic, while useful as an analytic framework suggestive of the tenor of the times, implies that the underlying concern—such as that posed by the Mods and Rockers in Cohen's seminal work—is somehow not worthy of concern. Sexual abuse, no matter what its actual extent, is surely worthy of concern.

<sup>53</sup> Sandy Rovner, *Hot Line of Hope; After 'Adam,' Three Children are Found*, WASH. POST, May 1, 1985, at C1.

<sup>54</sup> See DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, *MISSING, ABDUCTED, RUNAWAY, AND THROWN-AWAY CHILDREN IN AMERICA, FIRST REPORT: NUMBERS AND CHARACTERISTICS NATIONAL INCIDENCE STUDIES* vii (1990).

As a result, focus and concern soon shifted from child abduction and abuse to sexual victimization. Even though it was never confirmed that Adam Walsh was sexually abused, his image persisted as a reminder of the possible depredations faced by children, and soon coalesced with media reports of widespread sexual abuse in day care centers, including centers in California, North Carolina, and Minnesota. Meanwhile, other child victimizations captured the nation's attention and fueled concern. In May 1989, a seven-year-old boy in Tacoma, Washington, (whose identity was not revealed) was sexually abused and mutilated by Earl Shriner, a recidivist sex offender with a long history of convictions. And in October 1989, eleven-year-old Jacob Wetterling was abducted from near his home in rural Minnesota by a masked male adult brandishing a gun.<sup>55</sup> Although no arrests were ever made, and his remains never found, the tragedy prompted his mother Patty to create the Jacob Wetterling Foundation, an organization that would come to have significant national influence on child violence and sexual abuse policy matters.<sup>56</sup>

The events in Washington State and Minnesota had major effect, not only because they garnered significant media attention, but also because they spurred renewed interest in a long-overlooked social control strategy: requiring that criminal offenders register with authorities. While the idea of registering ex-offenders originated in Europe and elsewhere, registration first took hold in the United States in the early 1930s, in the Los Angeles area, amid widespread concern over emigrant "gangsters." Florida, in 1937, became the first state to adopt a registration law, but did so sparingly, only requiring registration of persons convicted of felonies "involving moral turpitude" living in the state's three most populous counties. In 1947, California enacted the nation's first registration law of state-wide application, targeting convicted sex offenders. By 1989, however, only a handful of states had laws.<sup>57</sup>

In response to the assault by Shriner, as well as a series of other widely reported sexual victimizations of women and children, Washington State enacted its Community Protection Act of 1990. The expansive law, which not only contained the state's first registration provision and permitted the involuntary civil commitment of sex offenders, for the first time permitted public disclosure of identifying information on registrants themselves (a process that came to be known as "community notification"). Minnesota, in response to the Wetterling tragedy, enacted a registration law (sans community notification) in 1991, becoming the fifteenth state to require registration.<sup>58</sup>

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<sup>55</sup> Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1290 (2003).

<sup>56</sup> For a history of the organization and its advocacy efforts see Jacob Wetterling Foundation, <http://www.jwf.org> (last visited September 5, 2008).

<sup>57</sup> See LOGAN, *supra* note 7, at ch. 2.

<sup>58</sup> Logan, *supra* note 55, at 1293.

The aforementioned state developments did not escape the attention of Congress. Indeed, Wetterling's October 1989 disappearance in Minnesota prompted the state's senior U.S. Senator, David Durenberger (R-MN), in May 1991, to push for adoption of the "Crimes Against Children Registration Act."<sup>59</sup> Durenberger told his Senate colleagues:

The reasons for enacting this legislation on the national level are clear: sexual crimes against children are widespread; the people who commit these offenses repeat their crimes again and again; and local law enforcement officials need access to an interstate system of information to prevent and respond to these horrible crimes against children.<sup>60</sup>

Despite the uncertainty attending Jacob's disappearance, Durenberger stressed that if law enforcement "had been aware of the presence of any convicted sex offenders in the community, it would have been of invaluable assistance during those first critical hours of investigation."<sup>61</sup> Durenberger urged congressional adoption of a registration system like that enacted in Minnesota, which required persons convicted of a sexual offense against a child to register a home address with local law enforcement for a period of ten years after release into the community.<sup>62</sup> Representative Jim Ramstad (R-MN) introduced a similar bill in the House in July.<sup>63</sup> However, despite the backing of the Wetterling Foundation and bi-partisan support in both houses of Congress, registration failed to pass muster in the Senate after conference.<sup>64</sup>

Undaunted, Durenberger continued his push for legislation, which soon was renamed in memory of Jacob Wetterling.<sup>65</sup> In November 1993, the campaign was advanced in the House by Ramstad, who, along with numerous others, emphasized the need for a registration law in light of the purported high recidivism risk of sex

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<sup>59</sup> Associated Press, *Jacob's Parents Urge Support for Abuser Bill*, STAR TRIBUNE (Minneapolis), May 26, 1991, at B7 (noting and discussing Senate Bill 1170). A year earlier, Senator Durenberger, with Patty Wetterling and her son Trevor in the public gallery, spoke to his colleagues of Jacob's abduction and called for "more study and resources into reducing" child abductions. He also entered into the record a Department of Justice report and newspaper stories on the issue, as well as information on the Wetterling Foundation. 136 CONG. REC. S5761 (daily ed. May 7, 1990).

<sup>60</sup> 137 CONG. REC. S6702, S6703 (daily ed. May 23, 1991) (statement of Sen. Durenberger).

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at S6703.

<sup>63</sup> 137 CONG. REC. H5339, H5340 (daily ed. July 10, 1991) (introducing H.R. 2862).

<sup>64</sup> *See* 140 CONG. REC. S2825, S2825 (daily ed. Mar. 10, 1994) (statement of Sen. Durenberger discussing three years of unsuccessful efforts to enact registration legislation); 139 CONG. REC. S6863, S6863 (statement of Sen. Durenberger discussing failure of the 102nd Congress to pass registration as part of both Democratic and Republican crime bills).

<sup>65</sup> *See* 137 CONG. REC. S9809, S9822 (daily ed. July 11, 1991) (statement of Sen. Durenberger).

offenders.<sup>66</sup> Again, registration was touted for its capacity to provide law enforcement with access to information on convicted offenders in the immediate wake of a child being abducted or harmed.<sup>67</sup> According to Representative James Sensenbrenner (R-WI):

[b]ecause there is not a national registry of people who have been convicted of a crime against a child and have served their prison time and have been paroled out, law enforcement really is not able to track down those who would be the prime suspect as quickly as possible. So that is why the Jacob Wetterling Crimes Against Children Registration Act is before us today.<sup>68</sup>

Even though twenty-four states at the time had registration laws, a federal “stick”<sup>69</sup> was needed “to prod all States to enact similar laws and to provide for a national registration system to handle offenders who move from one State to another.”<sup>70</sup> Federal law would do so by threatening to withhold crime-fighting funds from states that failed to adopt registration requirements prescribed by Congress.<sup>71</sup>

In its original incarnations, starting in 1991, what was to become the Jacob Wetterling Act treated registrants’ information as “private data,” available only to law enforcement for investigative purposes and government agencies for confidential background checks on persons working with children.<sup>72</sup> Indeed, while the bill was being considered, efforts to permit community notification were rebuffed. A provision authorizing notification and also targeting “sexually violent predators,” who victimized adults, was inserted late in the process by Senator

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<sup>66</sup> See 139 CONG. REC. H10,319 H10,321 (daily ed. Nov. 20, 1993) (statement of Rep. Ramstad) (“We know that child sex offenders are repeat offenders. . . . Child sex offenders repeat their crimes again and again and again to the point of compulsion.”); see also, e.g., *id.* at H10,320 (statement of Rep. Sensenbrenner) (“The reason this bill is so important is because of the high rate of recidivism in persons who have committed crimes against children, and it is not just sex crimes against children but all crimes against children.”); *id.* at H10,322 (statement of Rep. Grams) (“Studies have shown that child sex offenders are some of the most notorious repeat offenders. . . . [T]his bill gives society the right to know where these convicted offenders reside.”).

<sup>67</sup> See *id.* at H10,320 (statement of Rep. Sensenbrenner); *id.* at H10,321 (statement of Rep. Ramstad).

<sup>68</sup> *Id.* at H10,320 (statement of Rep. Sensenbrenner).

<sup>69</sup> *Id.* (“The stick that is contained in this bill to make sure that those States that have not established this type of a list is the fact that if 3 years go by and a State does not have such a registry, their Bureau of Justice assistance grants funds are reduced by 10 percent and allocated to those States that have done this job.”).

<sup>70</sup> *Id.* at H10,321 (statement of Rep. Ramstad).

<sup>71</sup> 42 U.S.C. § 14071(g)(2) (2006); see also 139 CONG. REC. H10,319, H10,320 (daily ed. Nov. 20, 1993).

<sup>72</sup> 139 CONG. REC. H10,319, H10,320 (daily ed. Nov. 20, 1993); 137 CONG. REC. S6702, S6704 (daily ed. May 23, 1991).

Slade Gorton (R-WA) and Representative Jennifer Dunn (R-WA), based on provisions in Washington State's 1990 law.<sup>73</sup> Because House and Senate bills differed,<sup>74</sup> with the House version omitting community notification,<sup>75</sup> a conference committee was convened. Speaking on behalf of notification in summer 1994, Dunn urged on the House floor:

What is the point of registering and tracking these convicted predators if we are not going to share that information with the very citizens who are at risk? How can we justify knowing where a sexual predator has located, and not notify the women and families in that neighborhood? The rate of recidivism for these crimes is astronomical. We know that. And that is why it is incumbent upon us to ensure that community notification is encouraged. Without the community notification, the effort is reduced simply to the collection of data.<sup>76</sup>

Dunn's non-binding motion urging the conference committee to include a notification provision prevailed by a 420-13 vote, yet the committee's report, likely as a result of concern over its negative effects,<sup>77</sup> omitted notification.<sup>78</sup>

As history would have it, however, the report was released on the same day in late July 1994 as the media was dominated by reports of the rape and murder of seven-year-old Megan Kanka in suburban Hamilton Township, New Jersey, by a recidivist sex offender who lived nearby.<sup>79</sup> By then, members of Congress—and the American public—had been privy to an extended series of grisly child sexual victimizations and killings by recidivist offenders, including those of Zachary Snider (Indiana, July 1993) and Polly Klaas (California, October 1993). With news of the Megan Kanka tragedy, Senator Gorton and Representative Dunn took to the floor to castigate the conferees for omitting the community notification provision. Gorton stated:

[T]he conferees just do not get it. [Only providing information to police] is meaningless. It would not have helped Megan Kanka . . . . It would not have helped Polly Klaas. . . .

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<sup>73</sup> Robert T. Nelson, *Gorton, Dunn Oppose Crime Bill*, SEATTLE TIMES, Aug. 24, 1994, at A1.

<sup>74</sup> H.R. 324, 103d Cong. (1993), 139 CONG. REC. H10,319 (daily ed. Nov. 20, 1993).

<sup>75</sup> See Nelson, *supra* note 73.

<sup>76</sup> 140 CONG. REC. H5612, H5612 (daily ed. July 13, 1994) (statement of Rep. Dunn).

<sup>77</sup> See *id.* at (statement of Rep. Nadler raising concern over possible vigilantism and banishment of registrants).

<sup>78</sup> Nelson, *supra* note 73.

<sup>79</sup> *Id.*

The families in these communities and these innocent victims had a right to know that dangerous sexual predators were in their midst. My amendment to the crime bill would have provided exactly that kind of notification. . . .

I offer this bipartisan bill today in the memory of Megan Kanka, Polly Klaas, and the thousands of innocent victims of brutal rapists, molesters, and murderers, that deserve to know when sexually violent predators were released into their community.<sup>80</sup>

A week later, Dunn rose to speak in the House “with a deep sense of outrage”:

Seven-year-old Megan Kanka of New Jersey is dead, Mr. Speaker. Sexual predators were released into her community and they lured that precious little girl to a grisly death.

Conferees who worked to protect the rights of sexual predators should understand this: The next little girl killed by a released predator will haunt them.

Mr. Speaker, it is outrageous that a few conferees have supplanted their will for the will of the House. It is outrageous that this bill effectively denies notification to the next Megan Kanka or the next Polly Klaas, or to your mother or sister or daughter. And it is outrageous that we would place the rights of criminals over the rights of victims.<sup>81</sup>

Representative Dick Zimmer (R-NJ) made the absence of notification a key rallying point and Chris Smith (R-NJ), representing the township in which Megan Kanka lived, condemned the “arrogance” of the conferees and demanded that notification be included. Smith stated, “No one in the community knew the killer’s sordid past, Mr. Speaker. Had Megan’s grieving parents known that their neighbor was a dangerous person, they would have taken steps to protect their precious child. Megan’s parents had a right to know.”<sup>82</sup>

The redoubled effort to include a notification provision proved a success, in part as a result of lobbying efforts by President Bill Clinton,<sup>83</sup> who signed the

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<sup>80</sup> 140 CONG. REC. S10,638 (daily ed. Aug. 4, 1994) (statement of Sen. Gorton).

<sup>81</sup> 140 CONG. REC. H7939-40 (daily ed. Aug. 11, 1994) (statement of Rep. Dunn).

<sup>82</sup> *Id.* at H7950 (Aug. 11, 1994) (statement of Rep. Smith). *See also* Fred Bayles, *Murder Renews Calls for Sex Crime Registry*, CHI.-SUN TIMES, Aug. 8, 1994, at 3.

<sup>83</sup> *See* 140 CONG. REC. S11,889 (daily ed. Aug. 16, 1994) (statement of Sen. Lautenberg, recounting that the President had called him twice urging that a notification provision be included); Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. TIMES, Nov. 1,



legislation into law (with Maureen Kanka at his side)<sup>84</sup> as part of the massive \$30 billion omnibus anti-crime bill on September 13, 1994.<sup>85</sup>

Intended to compel the states to enact registration laws and ensure adoption of registration minima,<sup>86</sup> the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act required states to adopt its provisions if they wished to avoid losing ten percent of available Byrne Formula Grant criminal justice funds.<sup>87</sup> States had to do so within three years of the law's enactment, subject to a two-year extension for states making "good faith efforts," and any undistributed funds resulting from a state's failure to comply were to be reallocated to compliant states.<sup>88</sup>

In its final form, the Wetterling Act also affected a broader swath of offenders than originally envisioned. In initial form, in May 1991, the law targeted only persons "convicted of a criminal offense against a victim who is a minor."<sup>89</sup> When

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1994, at B1 (noting that "[w]hen President Clinton lobbied for the Federal crime bill last summer, he mentioned Megan and the need for a community-notification provision. That provision is now part of Federal law."). See also Katharine Q. Seelye, *Search for Votes on Crime Turns Up Only Uncertainty*, N.Y. TIMES, Aug. 17, 1994, at B6 (noting report from Rep. Susan Molinari that President Clinton had expressed his regret that community notification had been dropped from the bill and that he would seek to get it reinserted).

Clinton, as part of his "new Democrat" orientation, and anxious over Republican assertions that his policy of permitting gays to remain in the military amounted to condoning sexual perversion, as well as public statements that the Department of Justice had softened child pornography laws, quickly backed the legislation. Soon thereafter, in the wake of major electoral gains by Republicans in the 1994 elections, Clinton, seeking to not be outflanked by a Republican "family values" mantra, became a staunch supporter of legislation designed to target sex offenders and protect children. JENKINS, *supra* note 52, at 198-99.

<sup>84</sup> David Bauman, *Crime Victim's Mom: Signing of Crime Bill "Bittersweet,"* GANNETT NEWS SERVICE, Sept. 13, 1994.

<sup>85</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 [codified at 42 U.S.C. § 14071 (2006)]. The expansive law contained thirty-two separate titles, ranging from community policing, violence against women, the death penalty, mandatory minimum sentences for federal criminal offenders, and "truth-in-sentencing" provisions that provided "incentive grants" to states to ensure that state violent offenders serve at least 85% of their terms. The varied contents very likely accounted for the relatively close vote margins, 235-195 in the House, and 61-38 in the Senate. As discussed below, subsequent federal bills relating to registration and community notification passed by voice vote, by unanimous vote, or unanimous consent.

<sup>86</sup> See 139 CONG. REC. H10,319, H10,321 (daily ed. Nov. 20 1993) (statement of Rep. Ramstad); 139 CONG. REC. S15,295, S25,310 (daily ed. Nov. 8, 1993) (statement of Sen. Gorton).

<sup>87</sup> 42 U.S.C. § 14071(g)(2)(A). The 10% figure marked a decrease from that in prior bills. In its original incarnation, as proposed by Senator Durenberger in 1991, Wetterling mandated that noncompliant states would be totally barred from Byrne Grant funds, and later, in June 1991, threatened a 25% reduction. See 137 CONG. REC. S8907, S8914 (daily ed. June 27, 1991); 137 CONG. REC. S6702, S6703 (daily ed. May 23, 1991) (containing S. 1170).

<sup>88</sup> 42 U.S.C. § 14071(g)(1).

<sup>89</sup> 137 CONG. REC. S6702, S6703 (containing S. 1170) (daily ed. May 23, 1991).

signed into law by the president in September 1994, this requirement remained,<sup>90</sup> but the law also targeted persons (1) convicted of “a sexually violent offense”<sup>91</sup> or (2) designated by the sentencing court as a “sexually violent predator.”<sup>92</sup> The registration requirement applied only to persons released from prison or placed on probation, parole, or supervised release after the Act’s implementation<sup>93</sup> and afforded individuals ten days to register.<sup>94</sup>

Sexually violent predators were subject to lifetime registration (with possible judicial relief)<sup>95</sup> and had to verify their addresses every ninety days.<sup>96</sup> The other two categories of registrants had to register for ten years<sup>97</sup> and annually verify their home address by returning a non-forwardable form mailed to them by law enforcement officials within ten days of receipt.<sup>98</sup> They were also required to provide a photograph and fingerprints (if not already on file).<sup>99</sup> Information on all

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<sup>90</sup> Such an offense was defined as:

[A]ny criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses:

- (i) kidnapping of a minor except by a parent;
- (ii) false imprisonment of a minor, except by a parent;
- (iii) criminal sexual conduct toward a minor;
- (iv) solicitation of a minor to engage in sexual conduct;
- (v) use of a minor in a sexual performance;
- (vi) solicitation of a minor to practice prostitution;
- (vii) any conduct that by its nature is a sexual offense against a minor;
- ....
- (ix) an attempt [to commit one of the aforementioned offenses] . . . .

For purposes of this subparagraph conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.

42 U.S.C. § 14071(a)(3)(A).

<sup>91</sup> Defined to include “any criminal offense . . . [that consists of] aggravated sexual abuse or sexual abuse” (as defined by federal law) or “an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse” (as defined by federal law). *Id.* § 14071(a)(3)(B).

<sup>92</sup> Defined as “a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.” *Id.* § 14071(a)(3)(C). *See also id.* § 14071(a)(3)(D)-(E) (providing definitions for “mental abnormality” and “predatory”).

<sup>93</sup> *Id.* § 14071(b).

<sup>94</sup> *Id.* § 14071(b)(1)(A) (amended 1997).

<sup>95</sup> *Id.* § 14071(b)(6)(B)(iii).

<sup>96</sup> *Id.* § 14071(b)(3)(B).

<sup>97</sup> *Id.* § 14071(b)(6)(A).

<sup>98</sup> *Id.* § 14071(b)(3)(A) (amended 1997).

<sup>99</sup> *Id.* § 14071, (b)(1)(A)(iv) (current version).

registrants was to be shared with the Federal Bureau of Investigation.<sup>100</sup> Individuals who knowingly violated the law were “subject to criminal penalties in any State” in which the violation occurred.<sup>101</sup>

Congress, tracking the Washington State provision, elected to make community notification permissive, not mandatory. Information on registrants “may” be disclosed to law enforcement and government agencies doing background checks and law enforcement itself “shall release relevant information that is necessary to protect the public” regarding a registrant.<sup>102</sup>

Wetterling further specified that the Attorney General was to issue guidelines that elaborated on the Act’s provisions,<sup>103</sup> and in April 1994 the Attorney General did so.<sup>104</sup> Although not specified by Congress in Wetterling itself, the guidelines emphasized that the federal requirements constituted a “floor for state registration systems, not a ceiling.”<sup>105</sup> According to the guidelines, “[t]he general objective of the Act is to protect people from child molesters and violent sex offenders through registration requirements. It is not intended, and does not have the effect, of making states *less* free than they were under prior law to impose registration requirements for this purpose.”<sup>106</sup>

The guidelines noted a variety of ways that states could build upon the baseline requirements contained in Wetterling, including:

- broaden the scope of offenders made to register (both types of crimes and jurisdiction—e.g., those convicted in federal or military court);
- require address verification at more frequent intervals;
- mandate registration for longer periods of time;
- make registration retroactive, affecting persons released before the law’s enactment;
- require collection of other registration information (e.g., place of employment); and
- require registration of juvenile offenders (as opposed to juveniles prosecuted and convicted as adults).<sup>107</sup>

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<sup>100</sup> *Id.* § 14071 (b)(2)(A).

<sup>101</sup> *Id.* § 14071(d).

<sup>102</sup> *Id.* § 14071(e).

<sup>103</sup> *Id.* § 14071(a)(1).

<sup>104</sup> Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 61 Fed. Reg. 15,110 (Apr. 4, 1996) [hereinafter Wetterling Guidelines].

<sup>105</sup> *Id.* at 15,112.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 15,112–15,115.

The states enjoyed similar upward latitude with respect to community notification. Federal law imposed no limits on the “standards and procedures that states may adopt for determining when public safety necessitates community notification.”<sup>108</sup> With respect to which registrants should be subject to community notification, states were free to (1) engage in “particularized determinations that individual offenders are sufficiently dangerous to require community notification . . .” or (2) make “categorical judgments that protection of the public necessitates community notification with respect to all offenders with certain characteristics or in certain offense categories.”<sup>109</sup> Finally, the guidelines observed that Wetterling only permitted, and did not require, community notification. States electing to employ notification could authorize agencies “to release information as necessary” or allow the public to access registrants’ information.<sup>110</sup>

Wetterling was not the federal government’s last word on registration—far from it. Since 1994, Congress has repeatedly imposed new registration requirements on the states, pressuring compliance via its Spending Clause authority by threatening loss of ten percent of federal funds allocated under the Byrne Grant Program.

This inclination manifested itself again in May 1996, less than a year after Wetterling became law, when Representative Zimmer introduced H.R. 2137, mandating that states utilize community notification.<sup>111</sup> Concerned that states were “reluctant” to release information on registrants,<sup>112</sup> and that a lack of community notification in some twenty states might leave communities vulnerable and encourage sex offenders to migrate in search of anonymity,<sup>113</sup> Zimmer’s proposal, despite its obvious conflict with the regnant state-empowerment ideals of the Republicans’ “Contract with America,”<sup>114</sup> won unanimous support from both Houses of Congress.<sup>115</sup> In May 1996, President Clinton signed the federal

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<sup>108</sup> *Id.* at 15,116.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 15116–17.

<sup>111</sup> See 142 CONG. REC. H4451, H4452-53 (daily ed. May 7, 1996) (statement of Rep. Zimmer). See also *id.* at H4452, Committee on the Judiciary, Accompanying H.R. 2137, at \*2 (“It has been brought to the attention of the . . . Committee . . . that notwithstanding the clear intent of Congress that relevant information about these offenders be released to the public . . . some law enforcement agencies are still reluctant to do so.”).

<sup>112</sup> See *id.* at H4451 (statement of Rep. McCollum).

<sup>113</sup> *Minor & Miscellaneous Bills (Part 2) Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 98–102 (1996) (statement of Rep. Dick Zimmer, H.R. on the Judiciary).

<sup>114</sup> See CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellas eds., 1994).

<sup>115</sup> In the House, the vote in favor of the amendment was 418-0 and the Senate passed the bill by unanimous consent. For fuller discussion of the votes, including vote changes by individual

Megan's Law. With Richard and Maureen Kanka, Patty Wetterling, and the father of Polly Klaas at his side at the White House Rose Garden signing ceremony, Clinton remarked:

From now on, every State in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people's rights, but today America proclaims there is no greater right than a parent's right to raise a child in safety and love. Today America warns: If you dare prey on our children, the law will follow you wherever you go, State to State, town to town. Today America circles the wagon[s] around our children.<sup>116</sup>

Later, in his weekly radio address to the nation, President Clinton invoked the memory of Megan Kanka and emphasized the informational empowerment premise of the new federal mandate:

Nothing is more important than keeping our children safe. . . . That's why in the crime bill we required every state in the country to compile a registry of sex offenders, and gave states the power to notify communities about child sex offenders and violent sex offenders that move into their neighborhoods.

But that wasn't enough, and last month I signed Megan's [L]aw. That insists that states tell a community whenever a dangerous sexual predator enters its midst. Too many children and their families have paid a terrible price because parents didn't know about the dangers hidden in their own neighborhood. Megan's [L]aw, named after a seven-year-old girl taken so wrongly at the beginning of her life, will help to prevent more of these terrible crimes.<sup>117</sup>

And in a later address, he continued:

We are following through on our commitment to keep track of these criminals—not just in a single state, but wherever they go, wherever they move, so that parents and police have the warning they need to protect

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House members accounting for the final outcome, *see* LORD WINDLESHAM, POLITICS, PUNISHMENT, AND POPULISM 179–80 (1998).

<sup>116</sup> Remarks on Signing Megan's Law and an Exchange with Reporters, 1 PUB. PAPERS 763–64 (1996).

<sup>117</sup> *President Clinton's Weekly Radio Address* (CNN radio broadcast June 22, 1996), transcript available at <http://edition.cnn.com/US/9606/22/clinton.radio/transcript.html>.

our children. . . . Deadly criminals don't stay within state lines, so neither should law enforcement's tools to stop them.<sup>118</sup>

With Megan's Law, the federal government did not now merely permit community notification. States were instructed that they "*shall* release relevant information that is necessary to protect the public concerning a specific person required to register."<sup>119</sup> Again, guidelines issued by the Attorney General elaborated on the new law,<sup>120</sup> this time specifying the ways in which the states would not satisfy federal community notification expectations. States wishing to receive Byrne Grant funds could not merely release registrants' information to law enforcement, government agencies, victims, or potential employers. Nor could they comply by affording "purely permissive or discretionary authority" to officials to conduct notification. Rather, notification in some form and to some extent was required.<sup>121</sup>

The guidelines emphasized, however, that states retained discretion over which registrants in particular would be subject to community notification and how information on registrants would be disseminated.<sup>122</sup> Citing state experiences, the guidelines identified several ways the new community notification requirement could be satisfied. States could:

- (1) conduct risk assessments of all registrants, and release information in accord with assessed risk levels;
- (2) release information on registrants convicted of certain offenses, for instance persons convicted of child molestation, or recidivist sexual offenders; or
- (3) make registrant information available to the public for inspection upon their request, and make judgments about which individual registrants or classes of registrants are covered and what information will be disclosed concerning these registrants.<sup>123</sup>

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<sup>118</sup> Brian McGrory, *Clinton Sets Tracking of Sex Offenders*, BOSTON GLOBE, Aug. 25, 1996, at A1 (quoting *President Clinton's Weekly Radio Address* (Aug. 24, 1996)).

<sup>119</sup> 42 U.S.C. § 14071(e)(2) (2006) (emphasis added).

<sup>120</sup> Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009 (July 21, 1997) [hereinafter *Megan's Law Guidelines*].

<sup>121</sup> *Id.* at 39,019.

<sup>122</sup> *See id.* ("States do . . . retain discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes and to specify standards and procedures for making these determinations.").

<sup>123</sup> *Id.*

The guidelines did not address how registrants' information was to be disseminated, such as by means of mailings, personal visits, or community meetings. Nor did they specify what qualified as the "relevant information" that was to be disclosed.

Only a few months later, in October 1996, federal requirements were again expanded, with the Pam Lychner Sexual Offender Tracking and Identification Act of 1996,<sup>124</sup> named after a Houston real estate agent who was sexually assaulted by a twice-convicted felon who had moved to Texas after committing his crimes out-of-state.<sup>125</sup> Lychner retained the baseline ten-year registration requirement but expanded the lifetime registration requirement beyond designated sexually violent predators to also include offenders (1) twice convicted of committing a criminal offense against a minor, (2) twice convicted of committing a sexually violent offense, and (3) convicted of aggravated sexual abuse.<sup>126</sup>

Lychner also greatly enhanced federal involvement in the monitoring of registrants, creating a national database at the FBI consisting of registrant information provided by states, designed to allow the FBI to track the whereabouts of registrants.<sup>127</sup> While Wetterling had required states to forward registrant information to the FBI, Lychner required registrants themselves to submit information to the FBI—if they lived in a state without a "minimally sufficient registration program."<sup>128</sup> The FBI, in turn, was required to verify these registrants' identifying information and was authorized to release information as "necessary to protect the public."<sup>129</sup> If individuals failed to comply, they faced a fine of up to \$100,000 and a year in prison.<sup>130</sup>

Subsequent to Lychner, the U.S. enacted numerous other provisions, including:

- In 1997, the Jacob Wetterling Improvements Act, which required states to implement methods to identify individuals as sexually violent offenders; required registrants who changed state residences to register under the new state's laws; required registrants to register in states where they worked or attended school if those states differed

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<sup>124</sup> Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (codified at 42 U.S.C. § 14072 (2006)).

<sup>125</sup> Lychner and her two daughters were killed in the explosion of TWA Flight 800 off the coast of Long Island in 1996. Later that year Congress passed the Lychner Act in her memory.

<sup>126</sup> 42 U.S.C. § 14072(d)(2). "Aggravated sexual abuse" includes among other things sexual acts accompanied by force or threats, as well as any sexual act with a minor under the age of twelve. 18 U.S.C. § 2241 (2006).

<sup>127</sup> 42 U.S.C. § 14072(b).

<sup>128</sup> *Id.* at § 14072(c).

<sup>129</sup> *Id.* at § 14072(e)-(f).

<sup>130</sup> *Id.* at § 14072(i)(1)(a)-(b) (amended 1998).

from their state residence; directed states to participate in the national sex offender registry; required state procedures to ensure that registrants' addresses were verified at least annually; and extended registration requirements to eligible offenders convicted in federal or military courts.<sup>131</sup>

- In 1998, the Protection of Children from Sexual Predators Act, which modified how states were to determine whether a registrant qualified as a sexually violent predator.<sup>132</sup> Also in 1998, the Fiscal Year 1999 Omnibus Appropriations Bill specified that failure of state registration violations warranted a maximum term of one year imprisonment for a first offense and a maximum ten years for a subsequent offense.<sup>133</sup>
- In 2000, the Campus Sex Crimes Prevention Act, which required non-resident registrants to inform state authorities when they were employed, carried on a vocation, or enrolled as a student at colleges and universities, and apprise authorities of any change in status.<sup>134</sup> Registrants' information must be made available to the "campus community," a requirement institutions have satisfied by making the information available upon request or by maintaining a campus-specific registry.<sup>135</sup>
- In 2003, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, which required that each state create and maintain an Internet web site making registrants' information available to the public and directed the Department of Justice to maintain an Internet site with links to each state web site.<sup>136</sup>
- In 2005, implemented the National Sex Offender Public Registry (later renamed the Dru Sjodin National Sex Offender Public Registry), to be maintained by the Department of Justice, which assembles on

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<sup>131</sup> Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Improvements Act of 1997, Pub. L. No. 105-119, § 115, 111 Stat. 2440, 2461-67.

<sup>132</sup> Protection of Children from Sexual Predators Act of 1998 Pub. L. No. 105-314, § 102(2), 112 Stat. 2974, 2975-76.

<sup>133</sup> Pub. L. No. 105-277, Tit. 13, § 123, 112 Stat. 2681-72-73 (1998).

<sup>134</sup> Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(b)-(c), 114 Stat. 1537, 1538 (2000) (codified at 20 U.S.C. § 1092(f)(1) and 42 U.S.C. § 14071(j)).

<sup>135</sup> See Richard Tewksbury & Matthew Lees, *Sex Offenders on Campus: University-Based Sex Offender Registries and the Collateral Consequences of Registration*, 70 FED. PROBATION 50, 51 (2007).

<sup>136</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today [PROTECT] Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).



one web site links to state registries and creates a searchable national registry.<sup>137</sup>

Most recently, in 2006, by voice votes in both the House and Senate, and with more than three dozen co-sponsors, Congress adopted its most extensive array of state directives to date. The Adam Walsh Child Protection and Safety Act of 2006 (AWA)<sup>138</sup> was signed by President Bush on July 27, 2006, twenty-five years to the day after six-year-old Adam Walsh disappeared from a Florida mall. While named after Adam Walsh, and enacted in recognition of the advocacy work of his parents John and Reve Walsh (the former later became host of the popular television show “America’s Most Wanted”),<sup>139</sup> the AWA established the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program,<sup>140</sup> and named several of its constituent programs after other victims.<sup>141</sup> In addition to creating the first federal involuntary civil commitment law (targeting “sexually dangerous persons”),<sup>142</sup> and creating a national child abuse and neglect registry,<sup>143</sup> the AWA substantially overhauled federal registration and community notification policy, in the process expressly repealing the Wetterling Act, Megan’s Law, and the Lychner Act.<sup>144</sup> The AWA seeks, in the words of Congress, to establish a “comprehensive national system for the registration [of sex offenders and offenders against children].”<sup>145</sup> Jurisdictions wishing to receive their total allocation of funds under the Byrne Act program must “maintain a jurisdiction-wide sex offender registry conforming to the requirements” of the AWA’s provisions.<sup>146</sup>

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<sup>137</sup> S. 792, 109th Cong. (2005) (directing the Attorney General to make available a national registry via the Internet), *available at* <http://www.nsopr.gov>.

<sup>138</sup> Pub. L. No. 109-248, 120 Stat. 587 (2006).

<sup>139</sup> *Id.* at § 2, 120 Stat. 587 (2006).

<sup>140</sup> 42 U.S.C. § 16902 (2006). The law was enacted “in response to the vicious attacks by violent predators” against seventeen specified victims (including three adult females), exclusive of Adam Walsh. *See* 42 U.S.C. § 16901 (2006).

<sup>141</sup> *See, e.g.*, 42 U.S.C. § 16920 (2006) (establishing “Dru Sjodin National Sex Offender Public Website”); 42 U.S.C. § 16988 (2006) (establishing “Jessica Lunsford Address Verification Grant Program”); 42 U.S.C. § 16911(5)(A) (2006) (“Amie Zyla Expansion of Sex Offense Definition”).

<sup>142</sup> *See* 18 U.S.C. § 4248 (2006).

<sup>143</sup> *See* 42 U.S.C. § 16990 (2006). The registry is limited to “substantiated cases” of abuse and neglect and access to it is to be limited to government agencies (and their agents) in the child protective service field. *Id.* § 16990(e).

<sup>144</sup> Pub. L. No. 109-248, § 129, 120 Stat. 587, 6000-601(2006).

<sup>145</sup> 42 U.S.C. § 16901 (2006).

<sup>146</sup> 42 U.S.C. § 16912(a) (2006).

Like Megan's Law in 1996,<sup>147</sup> the AWA was motivated by concern over the variations in state registration and notification laws and their perceived laxness. Yet in 2006 this concern was much more palpable, with legislators repeatedly condemning state "loopholes," "disparities," and "deficiencies," which purportedly allowed an excess of 100,000 registrants to become "lost."<sup>148</sup> As Senator Orrin Hatch (R-UT), a co-sponsor of the bill explained, the AWA created "uniform standards for the registration of sex offenders," emphasizing that it was

critical to sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders. . . . Laws regarding registration for sex offenders have not been consistent from State to State[;] now all states will lock arms and present a unified front in the battle to protect children. Web sites that have been weak in the past, due to weak laws and haphazard updating and based on inaccurate information, will now be accurate, updated, and useful for finding sex offenders.<sup>149</sup>

Senator Joseph Biden (D-DE), another co-sponsor, urged that the AWA was needed to remedy perceived deficiencies in prior congressional efforts: "[t]his is about uniting 50 States in common purpose and in league with one another to prevent these lowlifes from slipping through the cracks. So we recognize that what we have done in the past did not do all we wanted to do."<sup>150</sup> State registration and notification laws, according to Senator Arlen Specter (R-PA), had "proved to be relatively ineffective, which requires the Federal Government to act on the national

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<sup>147</sup> See *supra* notes 112–113 and accompanying text; see also 142 CONG. REC. H4452, H4453 (daily ed. May 7, 1996) (statement of Rep. Zimmer) (urging adoption of the federal Megan's Law "so that all 50 states [would] be held to a common standard of community notification."). In the final Megan's Law Guidelines, issued in mid-July 1997, the Attorney General stressed that federal law "contemplates the creation of a gap-free network of state registration programs, under which offenders who are registered in one state cannot escape registration requirements merely by moving to another state." Megan's Law Final Guidelines, *supra* note 120, at 39011.

<sup>148</sup> See, e.g., H.R. Rep. No. 218, pt. 1, at 23–24 (2005); 151 CONG. REC. H7889 (daily ed. Sept. 14, 2005) (statement of Rep. Green); 152 CONG. REC. S8018 (daily ed. July 20, 2006) (statement of Sen. Allen); 152 CONG. REC. S8022 (daily ed. July 20, 2006) (statement of Sen. DeWine); 152 CONG. REC. S8030 (daily ed. July 20, 2006) (statement of Sen. Frist); *House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1355, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 9 (2005) (statement of Rep. Poe); *id.* at 13 (statement of Rep. Brown-Waite); 151 CONG. REC. H7893 (daily ed. Sept. 14, 2005) (statements of Rep. Royce and Rep. Graves); 151 CONG. REC. H7920 (daily ed. Sept. 14, 2005) (statement of Rep. Sensenbrenner); 152 CONG. REC. S8020 (daily ed. July 20, 2006) (statement of Sen. Cantwell).

<sup>149</sup> 152 CONG. REC. S8012, 8013 (daily ed. July 20, 2006) (statement of Sen. Hatch).

<sup>150</sup> *Id.* at S8013 (statement of Sen. Biden).

level.”<sup>151</sup> Representative Ginny Brown-Waite (R-FL) stated that it was “important that we send a loud and clear message that Congress is serious about protecting America’s children from predators, those same predators who would harm our children, our grandchildren, and our neighbor’s children . . . . Congress has a duty to act and protect our children nationwide, because these predators move from state to state.”<sup>152</sup> Representative Mark Udall (D-CO), echoing another commonly voiced sentiment, condemned the current “patch-work quilt of [fifty] different state systems for identifying and tracking sex offenders.”<sup>153</sup>

Ernie Allen, President and CEO of the National Center for Missing and Exploited Children, testifying before the House Judiciary Committee, emphasized what he saw as the difficulties created by the lack of “consistency” and “uniformity” in state laws that permitted registrants to “forum-shop” among states. “The public,” Allen urged, “has a right to know about all registered sex offenders living in our communities. The amount of protection a child is given shouldn’t depend on the state in which that child lives. There is clearly a need for more uniformity among state programs of community notification of sex offenders.” A “seamless, coordinated, uniform system that works” was needed and states should disclose information on all registrants, not merely those deemed most likely to recidivate.<sup>154</sup>

Roughly two years in the making, the AWA mandates major changes in state registration and community notification laws. The first way it does so is by broadening the scope of offenses warranting registration.<sup>155</sup> Whereas Wetterling required registration for persons convicted of a sexually violent offense or a crime against a minor, the AWA requires that all persons convicted of a “sex offense” register, a category that includes five sub-categories.<sup>156</sup> Also, for the first time, juvenile offenders must register. Whereas Congress previously required that juveniles convicted as adults register, the AWA requires that individuals age fourteen or over adjudicated delinquent in the juvenile system for the following

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<sup>151</sup> *Id.* at S8029 (statement of Sen. Specter).

<sup>152</sup> 152 CONG. REC. H681 (daily ed. Mar. 8, 2006) (statement of Rep. Brown-Waite).

<sup>153</sup> 152 CONG. REC. H5729 (daily ed. July 25, 2006) (statement of Rep. Udall).

<sup>154</sup> *Protecting Children from Violent Criminals and Sexual Predators: What Needs to be Done? Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 19 (2005) (statement of Ernie Allen, President & CEO of The National Center for Missing & Exploited Children).

<sup>155</sup> Congress apparently wanted there to be no mistake about this, designating the subsection for the category of registerable offenses the “Amie Zyla expansion of sex offense definition” (see 42 U.S.C. § 16911(5) (2006)) and “Expansion of definition of ‘specified offense against a minor’ to include all offenses by child predators” (see 42 U.S.C. 16911(7) (2006)).

<sup>156</sup> The AWA excludes from coverage any offense involving “consensual sexual conduct”—if the victim was an adult, “unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.” 42 U.S.C. § 16911(5)(C) (2006).

offenses must register: (1) engaging in a sexual act with a child under the age of twelve; (2) engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim; (3) engaging in a sexual act with another by force or the threat of serious violence; or (4) an attempt or conspiracy to commit any of the aforementioned offenses.<sup>157</sup> The AWA also requires, again for the first time, that state registration laws encompass tribal and foreign nation convictions.<sup>158</sup>

Eligible individuals now must register, keep their registration current, and provide a new photo, in each place they live, go to school and work,<sup>159</sup> and do so before completing a sentence of imprisonment for a registerable offense or not later than three business days after being sentenced for the offense if not sentenced to prison.<sup>160</sup> When they register, far more information must be collected, including: social security number, employment and school location information, finger and palm prints, a DNA sample, and vehicle license plate number and description.<sup>161</sup> Also, when registrants leave their home jurisdiction for seven or more days, they must inform the jurisdiction as well as the destination jurisdiction.<sup>162</sup>

The centerpiece of the AWA is its tier classification system. As noted above, the federal Megan's Law left to states the question of how registrants were to be distinguished for purposes of registration requirements and community notification, and merely noted several possible techniques, including the two chief methods now used by states: one premised on the nature of the offender's conviction ("conviction-based") and the other premised on an individualized risk assessment ("risk-based"). The AWA prescribes use of a conviction-based approach, based on a three-tiered registrant classification system:

- "Tier III sex offenders" are persons convicted of an offense punishable by imprisonment for more than one year and whose offense:
  - involves engaging in a sexual act with another by force or threat;
  - occurs after the offender becomes a "tier II sex offender"; or

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<sup>157</sup> 42 U.S.C. § 16911(8) (2006).

<sup>158</sup> 42 U.S.C. § 16911(6) (2006). With respect to foreign convictions, the AWA specifies that registration is not required if the conviction was "not obtained with sufficient safeguards for fundamental fairness and due process for the accused," as specified in guidelines to be issued by the Attorney General. 42 U.S.C. § 16911(5)(B) (2006).

<sup>159</sup> 42 U.S.C. § 16913(a) (2006). In addition, when initially registering, individuals must register in the jurisdiction where s/he was convicted, if different from the jurisdiction in which s/he resides. 42 U.S.C. § 16913(a) (2006).

<sup>160</sup> 42 U.S.C. § 16913(b) (2006).

<sup>161</sup> 42 U.S.C. § 16914(a) (2006).

<sup>162</sup> *Id.* The AWA omits any mention of another emigrant population: long-distance truckers.

- is comparable to or more severe than the following offenses, or a conspiracy or attempt to commit the following federal offenses: sexual abuse or aggravated sexual abuse; abusive sexual contact against a minor under age 13; kidnapping of a minor (unless a parent or guardian).
- “Tier II sex offenders” are persons other than “tier III sex offenders” whose offense is punishable by imprisonment of more than one year and whose offense:
  - is comparable to or more severe than the following federal offenses, or attempts or conspiracies to commit such offenses, involving a minor: sex trafficking; coercion and enticement; transportation with intent to engage in sexual activity; abusive sexual contact; or
  - “involves” use of a minor in a sexual performance, solicitation of a minor to engage in a sexual performance, solicitation of a minor to engage in prostitution, or production or distribution of child pornography.
- “Tier I sex offenders” are eligible registrants other than “tier II” or “tier III” sex offenders, a residual category covering misdemeanor offenses warranting a year or less imprisonment.<sup>163</sup>

Under the AWA, tier designation determines duration of registration and the intervals at which registration information must be verified and updated. Tier I offenders must register for a minimum of fifteen years and verify their registration on an annual basis in-person (prior law allowed for mail-in verification). Tier II offenders must register for twenty-five years and verify information in-person twice a year. Tier III offenders must register for their lifetimes and verify information in-person four times a year. When verifying information, registrants must also submit to a new photograph.<sup>164</sup> Any changes to registration information (e.g., home or work address) must be reported to at least one jurisdiction in which the registrant resides, works or is enrolled in school, within three days of such change.<sup>165</sup>

The AWA requires that all statutorily eligible registrants register without any basis to challenge the registration requirement for the specified duration.<sup>166</sup> In

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<sup>163</sup> 42 U.S.C. § 16911(1)-(4) (2006).

<sup>164</sup> 42 U.S.C. § 16916 (2006).

<sup>165</sup> 42 U.S.C. § 16913(c) (2006).

<sup>166</sup> 42 U.S.C. §§ 16915 (duration), 16916 (verification intervals) (2006). The AWA, specifies, however, that certain individuals can have their designated registration periods reduced: (i) Tier I registrants, reduced by five years if they have a “clean record” for 10 years (i.e., 10-year total duration) and (ii) Tier III registrants who are juveniles, reduced to 25 years if “clean” for 25 years (e.g., 25-year total duration). *Id.* § 16915(b)(2),(3). For a definition of “clean record” see *id.* § 16915(b)(1).

addition, all registrants are automatically subject to community notification—at least by means of Internet web sites that states are required to create and maintain.<sup>167</sup> “[A]ll information about each sex offender in the registry” is to be made available, except for certain specified information (e.g., the victim’s name, the registrant’s social security number).<sup>168</sup> In turn, registrants’ information will be included in and made available for public view on the Dru Sjodin National Sex Offender Public Website maintained by the Attorney General.<sup>169</sup>

The AWA also adds new and harsher penalties for registration violations. For the first time, federal law specifies a minimum penalty that states must impose for registration violations—a maximum term of imprisonment in excess of one year.<sup>170</sup> It also, again for the first time, imposes federal criminal liability for registration violations.<sup>171</sup> Invoking its Commerce Clause (as opposed to its Spending Clause) authority, Congress has made it a federal crime for any individual required to register to knowingly fail to do so or to fail to update registration, and “travel[] in interstate or foreign commerce, or enter[] or leave[], or reside[], in, Indian country.” Violators are subject to a \$250,000 fine and maximum ten years in federal prison.<sup>172</sup> Furthermore, the AWA specifies that federal law enforcement, including the U.S. Marshals Service, shall be used “to assist jurisdictions in locating sex offenders and apprehending sex offenders who violate sex offender registration requirements.”<sup>173</sup> Pursuant to this authority, the Marshals Service has since launched Operation FALCON,<sup>174</sup> resulting in the arrest of hundreds of

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<sup>167</sup> 42 U.S.C. § 16918(a) (2006).

<sup>168</sup> 42 U.S.C. § 16918(b) (2006). The AWA provides that jurisdictions may exempt from disclosure “any information about a tier I sex offender convicted of an offense other than a specified offense against a minor”; the name (but not location) of a registrant’s employer; the name of the institution where a registrant is a student; and any other information the Attorney General might exempt. *Id.* § 16918(c).

<sup>169</sup> 42 U.S.C. § 16920 (2006).

<sup>170</sup> 42 U.S.C. § 16913(e) (2006). Indian tribes, however, because their justice systems lack authority to impose in excess of six months incarceration, are exempt from this requirement. *Id.* § 16912(2).

<sup>171</sup> See *United States v. Smith*, 481 F. Supp. 2d 846, 849 (E.D. Mich. 2007) (quoting H.R. Rep. No. 109-218, at 36 (2005)) (noting that AWA “created ‘a new Federal crime’ where ‘[s]ex offenders who fail to comply will face felony criminal prosecution.’”).

<sup>172</sup> 18 U.S.C. § 2250 (2006). In addition, individuals who commit a “crime of violence” under federal law, the law of the District of Columbia, tribal law, or the law of any U.S. territory of possession, while unregistered, face a minimum of five years and a maximum of thirty years. *Id.* § 2250(c).

<sup>173</sup> 42 U.S.C. § 16941(a) (2006).

<sup>174</sup> See Operation FALCON, <http://www.usdoj.gov/marshals/falcon/index.html>. (last visited September 5, 2008). The acronym represents “Federal and Local Cops Organized Nationally.”

individuals for alleged registration violations, and in late April 2007 the first sentence was handed down in federal court for a registration violation.<sup>175</sup>

In addition, the AWA lays the foundation for a far more comprehensive and uniform national registry. Each state must provide the Attorney General with information on registrants,<sup>176</sup> which will be maintained in the National Sex Offender Registry to be operated by the Federal Bureau of Investigation, and made available to all jurisdictions (yet not the public).<sup>177</sup> The Attorney General, in turn, must maintain the Dru Sjodin National Sex Offender Public Website, noted above, containing information on all of the nation's registrants. The AWA specifies that the website shall allow, at a minimum, "the public to obtain relevant information for each sex offender by a single query for any given zip code or geographical radius set by the user."<sup>178</sup>

Furthermore, the AWA creates a new federal bureaucratic apparatus to administer and monitor registration. It authorizes a Sex Offender Management Assistance grant program to help states implement and satisfy new requirements, with bonus payments for early implementation.<sup>179</sup> In addition, it establishes a Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) Office within the Department of Justice to administer standards and grants, as well as assist states with compliance.<sup>180</sup> The AWA also imposes a series of reporting requirements on various federal entities. The Attorney General must annually report to Congress on state efforts to comply with the AWA, and the role of the Marshal's Service and federal prosecutors in enforcing the new federal failure-to register law.<sup>181</sup> The Attorney General is directed to assemble a task force to study and report on the "efficiency and effectiveness" of risk versus conviction-based classification regimes and various means to reduce sex offender

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<sup>175</sup> See Pedro Ruz Gutierrez, *Sex-Offender Sentence Tests Adam Walsh Law*, ORLANDO SENTINEL, Apr. 26, 2007 (discussing case of Wilfredo Madera, who had moved from New York to Florida without registering with Florida authorities).

<sup>176</sup> 42 U.S.C. § 16921 (2006).

<sup>177</sup> 42 U.S.C. § 16919 (2006).

<sup>178</sup> 42 U.S.C. § 16920(a) (2006).

<sup>179</sup> 42 U.S.C. § 16926(c) (2006). The effort was not unprecedented: in March 1998 the Bureau of Justice Statistics, part of the U.S. Department of Justice, created the National Sex Offender Registry Assistance Program, intended to help states in satisfying federal directives starting with the Wetterling Act. The "Sex Offender Monitoring Assistance Program" provided funds based on the "annual number of sex offenders registered." See Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 607(i)(2)(B)(i), 112 Stat. 2974, 2985-86 (1998) (codified at 42 U.S.C. § 14071 (2000)). Under this approach, it bears mention, small population states were disadvantaged and all states were provided an incentive to expand their registry rolls, even if not supported by sound policy rationale, and indeed even if registry information was incorrect.

<sup>180</sup> 42 U.S.C. § 16945 (2006).

<sup>181</sup> 42 U.S.C. § 16991 (2006).

recidivism.<sup>182</sup> The National Institute of Justice, the research arm of the Department of Justice, must by 2011 (with annual interim reports) conduct a comprehensive study the costs, effectiveness, and possible ways to improve registration and community notification.<sup>183</sup> The AWA also authorizes a variety of grants to assist states in enforcing registration requirements<sup>184</sup> and address verification of registrants in particular.<sup>185</sup>

Finally, the AWA, like predecessor laws, is augmented by guidelines promulgated by the Attorney General. Whereas prior express delegations of congressional authority relative to registration and notification were quite modest, the AWA confers broad authority to “issue guidelines and regulations to interpret and implement” the law’s provisions.<sup>186</sup> Pursuant to this authority the Attorney General has issued extensive guidelines on the nature and scope of the AWA, including the critically important issue of its retroactive application.<sup>187</sup> As interpreted by the Attorney General, the AWA applies to all individuals covered by its terms, including those whose convictions predate its enactment in July 2006. The guidelines specify that states must register statutorily eligible individuals who are incarcerated or under supervision, either for the registration-triggering offense or some other crime; already registered or subject to a pre-existing state registration provision; and (perhaps most significant) reenter the state’s criminal justice system as a result of any conviction—including for a non-registerable offense.<sup>188</sup>

The upshot of the AWA is that the U.S. has mandated a considerable array of changes in state laws, including:

- the range of offenses covered (e.g., “sexual contact”; possessing child pornography; and misdemeanors);
- the retroactive extent of registration;
- the duration of registration (e.g., fifteen-year minimum and new 25-year category);
- the capacity of statutorily eligible individuals to appeal and perhaps avoid registration;
- the registration of juveniles;

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<sup>182</sup> Pub. L. No. 109-248, § 637, 638, 120 Stat. 587, 643–644 (2006).

<sup>183</sup> Pub. L. No. 109-248, § 634, 120 Stat. 587, 643–644 (2006).

<sup>184</sup> 42 U.S.C. § 3797 (2003).

<sup>185</sup> 42 U.S.C. § 16988 (2006).

<sup>186</sup> 42 U.S.C. § 16912(b) (2006).

<sup>187</sup> Final Guidelines for Title I of the Adam Walsh Child Protection and Safety Act of 2006, the Sex Offender Registration and Notification Act (SORNA), July 1, 2008, *available at* [http://www.ojp.usdoj.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf) [hereinafter AWA Final Guidelines].

<sup>188</sup> *Id.* at 8.



- the information that must be provided (e.g., employer and school information, DNA sample);
- the frequency and method registration and updates are to occur (in-person);
- the jurisdictional origin of convictions (e.g., foreign governments, Indian tribes);
- the geographic locations in which registration must occur (residence, employment, school);
- the penalties for registration violations (in excess of a year);
- the scope of registrants subject to community notification, via the Internet at a minimum, pursuant to an “conviction-based” classification scheme; and
- the amount and type of information subject to public dissemination.

As in the past, Congress afforded states a period of time to comply with new federal mandates. The AWA specifies that jurisdictions have three years from the law’s effective date, July 27, 2006, to “substantially implement” its terms (as determined by the Attorney General), and thus avoid losing ten percent of Byrne Grant funds.<sup>189</sup> If past experience can serve as a guide, federal pressure will have considerable influence. As a result of financial pressure imposed by Wetterling in 1994, a time when thirty-eight states had registration laws,<sup>190</sup> by 1996 all states had registries (when Massachusetts passed its law).<sup>191</sup> Likewise, in May 1996, when Megan’s Law was adopted, only thirty states required community notification in some form,<sup>192</sup> but by 1999 all states had laws (when New Mexico passed its law).<sup>193</sup>

Conformity, however, has not always been seamless, with resistance reflected in several ways, including passively, with states acknowledging that conforming legislation was motivated by a concern over losing grant money, rather than endorsement of the federal policies themselves.<sup>194</sup> At other times, state officials

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<sup>189</sup> 42 U.S.C. §§ 16924, 16925. Alternatively, jurisdictions have one year after the Attorney General makes available computer software for the establishment and operation of “uniform sex offender registries and Internet sites,” if the software is available later than July 2009. *Id.* § 16923(a). The Attorney General is also authorized to permit one-two year extensions of the deadline. *Id.* § 16924(b).

<sup>190</sup> James Popkin & John Simons, *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 11, 1994, at 64, available at [http://www.usnews.com/usnews/culture/articles/940919/archive\\_013400print.htm](http://www.usnews.com/usnews/culture/articles/940919/archive_013400print.htm).

<sup>191</sup> Doris Sue Wong, *Weld Signs Bill Creating Sex-Offender Registry—Those Convicted Have to Register*, BOSTON GLOBE, Aug. 6, 1996, at B2.

<sup>192</sup> See 142 CONG. REC. S4921 (daily ed. May 9, 1996) (statement of Sen. Dole).

<sup>193</sup> *Roundhouse Roundup*, ALBUQUERQUE TRIB., Mar. 13, 1999, at D5.

<sup>194</sup> See, e.g., *State v. Chun*, 76 P.3d 935, 940 (Haw. 2003) (citing language in Hawaii legislative debates).

have publicly criticized federal strictures and expressed resentment over being subject to what they considered unfunded federal mandates,<sup>195</sup> have been slow to comply,<sup>196</sup> and, in isolated instances, failed to wholly codify individual federal requirements.<sup>197</sup> Whether there will be full compliance with the AWA provisions will not be clear until at least late July 2009, the deadline set by Congress.<sup>198</sup> While six states hurriedly took steps to enact the AWA,<sup>199</sup> in order to be eligible to receive “early bonus” payments authorized (but not yet allocated) by Congress,<sup>200</sup> others have expressed reservations, raising particular concern over the AWA’s insistence that juveniles be registered<sup>201</sup> and the law’s retroactive scope.<sup>202</sup> As the

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<sup>195</sup> See, e.g., Kirk Mitchell & Sean Kelly, *Predator or Just an Offender? A Colorado Law is Supposed to Inform Neighbors When High-Risk Sexual Offenders Move Nearby. But It’s Been Used Rarely and Works Poorly—Some Say By Design*, DENVER POST, May 29, 2005, at A1 (noting relative laxness of Colorado’s law compared to others and quoting state official as saying that state adopted community notification only under federal pressure); Mary K. Reinhart, *New U.S. Law Puts Teen Sex Offenders on the Web*, EAST VALLEY TRIB. (Mesa, Ariz.), Sept. 13, 2007 (noting that Arizona lawmakers and officials “suggested that the [AWA] might cost more than [Byrne funds] to implement”).

<sup>196</sup> See *Federal Funds at Stake for 14 States with Megan’s Law Problems*, 27 LAW ENFORCEMENT NEWS 7 (Nov. 30, 2001) (noting Alabama, Indiana, Maryland, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Texas, Virginia, and Washington).

<sup>197</sup> Colorado, for instance, failed to require registration of persons convicted of non-parent kidnapping and false imprisonment of a minor, despite Wetterling’s contrary requirements. See COLO. REV. STAT. § 16-22-101 (2006). California and Delaware qualified that any kidnapping or false imprisonment be sexually motivated. See CAL. PENAL CODE § 290(2)(A) (2008); DEL. STAT. Tit. 11 § 4121(4)(A) (2007). See generally U.S. Dept. of Justice, Bureau of Justice Statistics, Summary of State Offender Registries, 2001 (March 2002, NCJ 192265) (noting jurisdictions with divergent provisions).

<sup>198</sup> See 42 U.S.C. § 16924(a)(1) (2007). The Guidelines, critically important for the detail and guidance they provide on the AWA, were not issued even in proposed form until May 2007, and were not released in final form until July 2008. Presumably, in light of this tardiness, at a minimum the Department of Justice will be obliged to invoke the AWA’s discretionary one-year grace period. See *id.* § 16924(b). Moreover, as noted, jurisdictions have one year after the Attorney General makes available necessary computer software, and if the software is available later than July 2009, the Attorney General is authorized to permit up to two one-year extensions. *Id.* § 16924(b).

<sup>199</sup> See John Gramlich, *Will States Say “No” to the Adam Walsh Act?*, available at <http://www.stateline.org/live/details/story?contentId=273887> (noting Delaware, Florida, Louisiana, Mississippi, Nevada, and Ohio). The Attorney General, however, determined for undisclosed reasons that Louisiana’s codification failed to satisfy the AWA. *Id.*

<sup>200</sup> See, e.g., Executive Order Number 35: Gov. Riley Creates Governor’s Community Notification Task Force, Aug. 27, 2007 available at <http://governorpress.alabama.gov/pr/ex-35-2007-08-29.asp> (noting initiative by Alabama governor to enact AWA early and secure bonus).

<sup>201</sup> See, e.g., Steve Peoples, *Legislators Look to Toughen Sex-Offender Laws*, PROVIDENCE J., Aug. 1, 2007, at B1 (R.I.); Luige del Puerto, *Arizona Officials Express Concerns Over Federal Sex Registry Law*, ARIZONA CAPITOL TIMES, Nov. 30, 2007 (Ariz.); Lisa Sandberg, *Sex Registry Called too Harsh for Juveniles*, HOUS. CHRON., Feb. 17, 2008 (Tex.).

<sup>202</sup> See, e.g., Peoples, *supra* note 201 (R.I.).

cost of implementing mandates becomes clearer, even among states with conviction-based regimes like that of the AWA, further resistance can be expected.<sup>203</sup>

### C. Federal Motivations Scrutinized

From 1994–2006, the U.S. engaged in a sustained effort to force registration and community notification upon the states. Over time, federal prescriptions have become ever more exacting, culminating with the AWA, which contains the most ambitious requirements to date.<sup>204</sup> This zenith resulted from congressional concern that state registration and community notification laws were “weak” and fraught with “loopholes,” and that their diverse nature created a “patchwork” permitting registrants to evade continued scrutiny, especially as a result of inter-state travel. These assertions, however, remain questionable.

As a threshold matter, the issue of “weak” state laws presupposes a knowledge base not yet in existence. Remarkably, almost twenty years after Washington State adopted its Community Protection Act of 1990, marking the modern resurgence of registration and the genesis of community notification, precious little effort has been dedicated to testing the mainstay suppositions that the laws: (1) deter registrants from re-offending, based on the belief that they are being watched; (2) enhance the ability of police to investigate and perhaps prevent acts of recidivism, based on knowledge of the whereabouts of registrants; and (3) empower community members with information on registrants, permitting them to take protective action and perhaps assist law enforcement in the monitoring of registrants.<sup>205</sup> Indeed, not until the AWA did Congress expressly mandate evaluation of the core issue of the relative effectiveness of risk and conviction-based registrant classification schemes<sup>206</sup> and the effectiveness and costs of

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<sup>203</sup> For instance, when Oklahoma revamped its conviction-based system in accord with the AWA, 78% of registrants fell into the Tier III category, requiring lifetime registration and in-person updates every ninety days. See KOTV.com, *Laws Targeting Sex Offenders Take Effect* (Nov. 1, 2007), <http://www.newson6.com/GLOBAL/story.asp?s=7732295>.

According to one recent study, in all jurisdictions the estimated first-year costs of implementing the AWA will outweigh the cost of lost Byrne funds, often by substantial degree. In Virginia, for instance, it is estimated that first-year compliance would cost over \$12 million while Byrne Grant losses would be roughly \$400,000. See Justice Policy Institute, *What Will It Cost States to Comply with the Sex Offender Registration and Notification Act?* (2008), [http://www.justicepolicy.org/images/upload/08-08\\_FAC\\_SORNACOSTS\\_JJ.pdf](http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACOSTS_JJ.pdf).

<sup>204</sup> See AWA Final Guidelines, *supra* note 187, at 72 (noting that the AWA “is more comprehensive and contemplates greater uniformity among jurisdictions than [prior laws] ...in that it generally establishes a higher national baseline.”).

<sup>205</sup> For an overview of the limited research conducted to date see LOGAN, *supra* note 7, ch. 5.

<sup>206</sup> See 42 U.S.C. § 16991 [P.L. 109-248, § 637] (to be conducted by the Attorney General).

registration and notification more generally.<sup>207</sup> This—twelve years after Congress began imposing registration and community notification on the states, and after the AWA itself mandated that states adopt a conviction-based scheme.

Congressional concern over “loopholes” leading to the frequently quoted figure of over 100,000 “missing” registrants (itself an unverified estimate) is no more persuasive. As has so often been the case, the scenarios publicly advanced on the House or Senate floor as evidencing the need for a legislative fix were inapposite.<sup>208</sup> With the AWA, the February 2005 rape and murder of nine-year-old Jessica Lunsford served as a prime catalyst. According to Representative Ginny Brown-Waite (R-FL), the tragedy could have been avoided if provisions such as contained in the AWA had been in place.<sup>209</sup> John Couey, a registrant ultimately convicted of the crime, however, was “missing” because he failed to notify authorities of his residence change within Florida.<sup>210</sup> The AWA’s provisions of particular relevance, its in-person verification requirement and heightened penalties for non-compliance, would have been of no effect, given that Couey could still have deceived authorities as to his address and Florida’s penalty at the time (up to five years) exceeded that required by the AWA. The solution, if any, lay in enforcement by Florida authorities of Florida law (like the AWA, a conviction-based regime, among the nation’s toughest),<sup>211</sup> and mandated home visits by police, the latter not required by the AWA. As with other federal criminal justice policy efforts<sup>212</sup> and environmental policy,<sup>213</sup> empirically unsupported supposition fueled federal policy.

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<sup>207</sup> See 42 U.S.C. § 16990 [P.L. 109-248, § 634] (to be conducted by the National Justice of Justice).

<sup>208</sup> For instance, the identity of neither Adam Walsh nor Jacob Wetterling’s killer has ever been identified, and it remains unknown whether the boys were sexually victimized, undercutting the premise that recidivist sex offenders should be targeted by the laws.

<sup>209</sup> See 151 Cong. Rec. H7880 (daily ed. Sept. 14, 2005) (statement of Rep. Brown-Waite); House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1505, H.R. 2423, H.R. 2796, and H.R. 2797 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 109<sup>th</sup> Cong. 11–13, 23 (2005) (statement of Rep. Brown-Waite).

<sup>210</sup> Robert Farley et al., *For Police, Tracking Sex Offenders Can Get Tricky*, ST. PETERSBURG TIMES, Apr. 3, 2005, at 3A.

<sup>211</sup> See Top Ten Reviews Sex Offender Registry Review, <http://sex-offender-registry-review.toptenreviews.com/> (last visited Sept. 18, 2007) (providing state-by-state assessment of rigor of registration regimes).

<sup>212</sup> Aimee’s Law, enacted by Congress in 2000, is one such example. See 42 U.S.C. § 13713 (2000). The law was premised on the belief that violent offenders, released prematurely from states, travel to other states to commit crimes. Subsequent research by the Department of Justice, however, was unable to demonstrate the occurrence. Using a 1994 cohort based on a sample of over 9000 offenders released in 13 states, only 31 committed a sex crime in another state. See Letter from Acting Assistant Attorney General James H. Clinger to Senate Majority Leader Bill Frist, Dec. 26, 2006 (on file with author). The program itself was never funded and implementing guidelines have not been issued by the Attorney General.

Congressional concern over the “patchwork” of inadequate state laws (ironically, itself permitted by the “floor” imposed by federal law), theoretically fostering travel-evasion by registrants motivated to escape more onerous state requirements, is also questionable. Not only does the concern bespeak existence of an optimal registration and community notification regime, again itself an open question, but also the phenomenon of travel-evasion itself. While over the years some anecdotal evidence has existed of registrants forum-shopping for a more lenient state residence, no statistical evidence exists of the occurrence.

But even if it were shown to exist, basis would still exist to question congressional intervention. Unlike other contexts in which federal intrusion has perhaps been justified, what might be considered weak state registration laws do not impose externalities on their fellow sovereigns. Rather, any weakness—presumably resulting in enhanced recidivism risks among registrants—would mainly be shouldered by residents of the weak state; negative outcomes would be internalized, not externalized. As discussed below, if a state is willing to be seen as a magnet for convicted sex offenders, based on exercise of its sovereign legislative authority, then federalism protects that choice. Presumably, citizens aggrieved by the prospect will move to a jurisdiction ostensibly less amenable to registrants, and target-hardening will naturally occur among states wishing to preserve their citizen base.<sup>214</sup> Moreover, even if New York’s law is thought weak, and a New York registrant one afternoon ventures to Connecticut to commit a sex crime, it is hard to see how the AWA’s more onerous requirements (e.g., in-person verification) will either (i) stop him from doing so or (ii) protect Connecticut’s residents against such victimization.<sup>215</sup>

In this respect, federal registration and notification laws are unlike their environmental counterparts, which seek to limit possible state proclivities toward lax pollution standards, to the disadvantage of other states,<sup>216</sup> and federal firearm laws, which seek to limit the spillover harms in other states associated with lax

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<sup>213</sup> See Jonathan H. Adler, *The Fable of Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 CASE W. RES. L. REV. 93 (2004) (noting how federal environmental laws were prompted by false understanding of state under-enforcement and mythology surrounding the 1969 fire on the Cuyahoga River in Cleveland).

<sup>214</sup> In reality, little evidence of this reaction thus far exists, with states such as Arkansas, New York, Minnesota, New Jersey, and Washington maintaining their risk-based regimes, amid a dearth of local political agitation for change.

<sup>215</sup> The shortcoming, of course, is a long-perceived one relative to registration and community notification in general, adding to the commonly expressed view that the laws only foster a false sense of security (for this and other reasons). See LOGAN, *supra* note 7, ch. 5.

<sup>216</sup> See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 14 U. PA. L. REV. 2341 (1996). Whether such externalities actually incite a race-to-the-bottom of state environmental laxness, warranting federal intervention, has long been disputed. See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 556 n.2 (2001) (citing articles advancing and critiquing the race-to-the-bottom assessment).

firearm regulation.<sup>217</sup> If anything, states are wary of being perceived as being soft on sex offenders.<sup>218</sup> The risk is thus not political laxness but rather overzealousness—a race not to the “bottom” but to the “top” (defined by ever-tougher state laws).

Finally, perversely, federal action might actually result in less demanding state registration and notification policy. It remains unclear, for instance, whether the conviction-based approach mandated by the AWA is so over-inclusive as to undercut the desired goal of public vigilance.<sup>219</sup> Concern also exists that the approach might enhance the prospects of recidivism among law-abiding ex-offenders, who while not being prone to recidivate, might do so as a result of the negative consequences of community notification.<sup>220</sup> As the North Dakota registry web site stated in October 2007 in justifying the state’s use of its risk-based regime, the “public notification of other offenders may have the unintended consequence of making them more risky.”<sup>221</sup> Moreover, the conviction-based approach required by the AWA actually might be less inclusive, such as when an individual pleads guilty to a lesser offense. Whereas a risk-based regime might capture such an individual on the basis of an individualized assessment,<sup>222</sup> the AWA would not because the plea basis will drive classification—and hence duration of registration and notification, the intervals of verification, and other matters.<sup>223</sup>

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<sup>217</sup> See Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681, 700 (2004).

<sup>218</sup> This “NIMBY” predisposition is vividly evidenced in the recent wave of state (and local) laws imposing sharp geographic restrictions on where registrants can live. See Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 *IOWA L. REV.* 1 (2006).

<sup>219</sup> As the Supreme Court observed in an unrelated context, “when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless....” *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring). See also *In re Registrant E.I.*, 693 A.2d 505, 508 (N.J. Super. Ct. App. Div. 1997) (“[I]f Megan’s Law is applied literally and mechanically to virtually all sexual offenders, the beneficial purpose of this law will be impeded.”).

<sup>220</sup> See Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, in *SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT* 337, 343–44 (N.Y. Academy of Sciences, 2003).

<sup>221</sup> See North Dakota Sex Offender Registry, North Dakota Sex Offender Web Site, <http://www.sexoffender.nd.gov/FAQ/faq.shtml> (last visited Oct. 2, 2007).

<sup>222</sup> For instance, such would be the possible outcome in Arkansas.

<sup>223</sup> A solution might lie in adoption of a provision similar to that in Minnesota, which permits registration on the basis of a specified registerable offense “or another offense arising out of the same set of circumstances.” *MINN. STAT. ANN.* § 243.166 subd. 1b(1).

### III. FEDERALISM CONSEQUENCES

As the foregoing makes clear, since 1994 the federal government has been in engaged in an ongoing effort to impose its will on the states on a matter of undisputed state concern—the community control of convicted sex offenders. With the Wetterling Act (1994) and Megan’s Law (1996), the U.S. required that all states adopt registration and community notification laws. Federal policy, according to guidelines promulgated by the Attorney General, provided a substantive “floor” for states on which they could impose more stringent requirements. With the AWA (2006), the federal government greatly expanded the “floor” of registration and community notification requirements, seeking more in the way of “uniform standards” for registration and community notification,<sup>224</sup> with the ultimate goal of securing a “comprehensive national system.”<sup>225</sup> The shift was plainly not lost on Congress, with members being at pains to emphasize that the AWA’s provisions “constitute, in relation to States, only conditions required to avoid the reduction of Federal funding,”<sup>226</sup> a clear nod to concern that the AWA’s prescriptions might run afoul of the Tenth Amendment’s anti-commandeering prohibition.<sup>227</sup> Congress also invoked its Commerce Clause authority, for the first time making it a federal crime to cross states lines and fail to register.<sup>228</sup> This Part examines the federalism implications of these developments.

#### A. State Autonomy

Traditionally, federalism, in its vertical (state-federal) form, has been thought to serve a variety of purposes, with state autonomy certainly figuring foremost.<sup>229</sup> Federal registration and community notification requirements have indisputably infringed this autonomy.<sup>230</sup> With the AWA, federal intrusiveness has reached a

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<sup>224</sup> Activities Report of the Committee of the Judiciary, S. REP. NO. 109-369, at 16 (2006).

<sup>225</sup> 42 U.S.C. § 16901 (2006).

<sup>226</sup> 42 U.S.C. § 16925(d) (2006).

<sup>227</sup> See *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>228</sup> 42 U.S.C. § 2250(a)(2)(B) (2006).

<sup>229</sup> See, e.g., *Printz*, 521 U.S. at 928 (“[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (stressing that states possess a “separate and independent autonomy”).

<sup>230</sup> The discussion here is limited to the AWA’s impact on the states. However, the AWA also significantly impinges on the autonomy of tribes, Puerto Rico, and U.S. territories. For more on the effects of the AWA on tribal sovereignty, which requires that tribes either create their own regimes or submit to those of a state, see Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country*, 6 OHIO ST. J. CRIM. L. 3 (2008). See also Timothy J. Droske, *The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country*, 101 NW. U. L. REV. 897 (2007).

high water mark, requiring major changes to state laws, for instance subjecting certain juveniles to registration and notification and requiring in-person registration verification.<sup>231</sup> The AWA also mandates that states employ a conviction-based, tier approach to registrant classification. The majority of states using an undifferentiated conviction-based approach will need to enact more refined laws that draw distinctions consistent with the AWA. The dozen or so states that employ risk-based schemes based on individualized evaluation will need to radically overhaul their regimes.

In mandating the comprehensive standards contained in the AWA, Congress did, to its credit, manifest some sensitivity to state autonomy. The AWA expressly provides that a state need not adopt any aspect of the AWA if doing so “would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction’s highest court.”<sup>232</sup> If such a constitutional conflict does exist, “the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of [the law] and to reconcile any conflicts” between the AWA and the jurisdiction’s constitution.<sup>233</sup> Under the AWA, “the Attorney General shall consult” with state officials “concerning the jurisdiction’s interpretation of the jurisdiction’s constitution and the ruling thereon by the jurisdiction’s highest court.”<sup>234</sup>

Sensitivity to state autonomy, however, only goes so far. No respect, for instance, is paid to state legislative or executive branch determinations. Only a constitutionally commanded position, backed by a holding from the state’s highest court (and seemingly not even a lowly intermediate appellate court), will suffice. Moreover, the U.S. promises to “work with the jurisdiction to see whether *the problem* can be overcome . . .”<sup>235</sup>—surely an unceremonious way to refer to a state-based constitutional right. If a jurisdiction fails to “substantially implement” the AWA, in the absence of a legitimate “demonstrated inability to implement” based on domestic constitutional dictate, or otherwise cannot satisfy the U.S. with an accommodation, it will lose its federal funding. Adding insult to injury, the share lost by a jurisdiction will be reallocated to other more compliant states.

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<sup>231</sup> It might also require changes in the substantive criminal law of states, such as when a state defines a minor as someone other than less than eighteen years of age, as specified by the AWA.

<sup>232</sup> 42 U.S.C. § 16925(b)(1) (2006).

<sup>233</sup> *Id.* § 16925(b)(2). The Final Guidelines for the AWA afford some apparent wriggle room for the Department’s assessment of “substantial implementation,” stating that the standard “contemplate[s] that there is some latitude to approve a jurisdiction’s implementation efforts, even if they do not exactly follow in all respects the specifications” of the AWA and the Guidelines. AWA Final Guidelines, *supra* note 187, at 10.

<sup>234</sup> 42 U.S.C. § 16925(b)(2) (2006).

<sup>235</sup> AWA Final Guidelines, *supra* note 187, at 11(emphasis added).



Disrespect for state autonomy has been particularly evident in the exercise of rule-making authority delegated to the Attorney General.<sup>236</sup> In the wake of the AWA's enactment in July 2006 the Attorney General, under the auspices of a new entity created by the AWA—the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (“SMART”)<sup>237</sup>—has issued a series of proposed and final guidelines. In February 2007, the Attorney General acted upon his specifically delegated authority,<sup>238</sup> suspended customary notice and comment requirements, and issued an “interim rule” with immediate effect,<sup>239</sup> ordaining that the AWA was to be retroactive in scope,<sup>240</sup> a policy with huge implications for states. In May 2007, the Attorney General issued proposed guidelines for the AWA as a whole, addressing a wide range of issues, as well as elaborating on the contours of retroactivity.<sup>241</sup>

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<sup>236</sup> See 42 U.S.C. § 16912(b) (2006) (“The Attorney General shall issue guidelines and regulations to interpret and implement this title.”); *id.* at § 16914(a)(7) (providing that the Attorney General has the authority to expand the scope of information, specified by the AWA, that registrants must provide state authorities for inclusion in their registries). The AWA also provides that the Attorney General has the authority to augment the kinds of information falling under the AWA’s list of “mandatory exemptions” from community notification (e.g., the social security numbers of registrants). *Id.* at § 16918(b)(4).

<sup>237</sup> 42 U.S.C. § 16945(a) (2006). The SMART Office is headed by a director appointed by the President, who reports to the Attorney General through staff in the Office of Justice Programs. *Id.* § 16945(b). The SMART Office has the authority to:

- (1) administer the standards for the sex offender registration and community notification program;
- (2) administer grant programs authorized by the AWA;
- (3) cooperate with and provide technical assistance to the States, units of local government, tribes, and other entities in relation to registration and community notification and other measures intended to protect the public against sexual abuse and exploitation; and
- (4) perform other functions specified by the Attorney General.

*Id.* § 16945(c).

<sup>238</sup> See 42 U.S.C. § 16913(d) (2006) (“The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act....”).

<sup>239</sup> The exception can be invoked if an agency finds “good cause” and establishes that the customary protocol would be “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B) (2006). To this end, the Attorney General emphasized the dangers presented by delay as a result of not registering individuals with pre-enactment convictions, see 28 C.F.R. Pt. 72 (2007), a not altogether convincing explanation given that the provision was to take effect six months to the day after the AWA’s enactment and thirteen years after the Wetterling Act, not to mention the two-year pendency of the AWW itself and the reality that persons targeted possibly had not committed a sexual offense for many years.

<sup>240</sup> See 72 Fed. Reg. 8894 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

<sup>241</sup> See 72 Fed. Reg. 30209 (May 30, 2007) (to be codified at 28 C.F.R. 82).

The guidelines were the subject of a forum hosted by SMART from July 24–27, 2007 in Indianapolis, Indiana,<sup>242</sup> just before the announced deadline to submit public comments.<sup>243</sup> The comments received reflect considerable frustration and concern over the substance of the guidelines as well as the process employed in their creation. For instance, a letter from the chair of Idaho’s Criminal Justice Commission expressed concern over the “breadth of the duties of the state” resulting from the retroactivity requirement, calling it “an onerous and unworkable burden on the state and its limited resources.”<sup>244</sup> A letter jointly signed by the heads of six New York State agencies concerned with implementation of the law urged that jurisdictions be afforded discretion on the retroactivity question:

When each state first created its sex offender registry, it made a choice about how the registration requirements would be applied to previously convicted offenders.

The decision on retroactive applicability raises substantial practical and policy concerns that are more appropriately addressed by the individual states. [Part of the guidelines] will greatly expand the pool of registerable sex offenders in New York State. It will also require the state to search the prior criminal history of each person entering the criminal justice system to determine whether, at any time in the past, he or she was convicted of, or adjudicated for, a qualifying sex offense. This is both burdensome and unworkable because in many case older records will no longer be available, or they will be incomplete or inaccurate.<sup>245</sup>

In addition, the New York letter elaborated, retroactivity expands the pool of registerable offenders, which will serve to “exacerbate the difficulties that states are now facing in finding appropriate housing for sex offenders.”<sup>246</sup>

The SMART office also received extensive criticism on the substance of the AWA itself. Many jurisdictions expressed major concern over the AWA’s requirement that juvenile offenders register and be subject to community notification.<sup>247</sup> New York’s letter, for instance, emphasized that requiring

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<sup>242</sup> The author was present at the gathering.

<sup>243</sup> The deadline for comments on the proposed interim rule on retroactivity ended on April 30, 2007; the deadline for the proposed guidelines ended on August 1, 2007.

<sup>244</sup> Letter from Brent D. Reinke, Chairman, Idaho Criminal Justice Commission, to Laura Rogers, Director SMART (July 31, 2007), *available at* [http://www.ojp.usdoj.gov/smart/pdfs/guideline\\_comments.pdf](http://www.ojp.usdoj.gov/smart/pdfs/guideline_comments.pdf). [hereinafter AWA Comments].

<sup>245</sup> Letter from Denise O’Donnell, Commissioner NYS Division of Criminal Justice Services et al., to Laura Rogers, Director, SMART (July 31, 2007), AWA Comments, *id.*

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., Letter from W.S. Flaherty, Superintendent of Virginia State Police, to Laura Rogers, Director, SMART (July 31, 2007); Letter from Jeanne Smith, Co-Chair Colorado of Adam

consultation of prior juvenile records, many of which have been sealed or expunged, was especially problematic because it contradicted “New York’s long standing policy that recognizes that young offenders have a strong potential for rehabilitation, and can be more effectively redirected into becoming productive citizens if they are not stigmatized as criminal or registered sex offenders.”<sup>248</sup> “For many states, including New York, [the juvenile registration provision] will require a substantial change in the treatment of juvenile offenders.”

More specific concerns raised by states included:

- objections to the requirement that registrants’ vehicle identification information be made publicly available<sup>249</sup>;
- the posting of offenders convicted of incest, which would permit the possible identification of victims<sup>250</sup>;
- the interpretive and documentation difficulties associated with having registration based on convictions in other states<sup>251</sup> and especially foreign nations<sup>252</sup>;
- the interpretive difficulties associated with the need to incorporate convictions under aged laws (especially in other states)<sup>253</sup> and

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Walsh Compliance Committee, to Laura Rogers, Director, SMART (July 16, 2007); Letter from Jeff Shimkus, Indiana Sex Offender Registration and Notification Team, “Feedback on Proposed Guidelines” to SMART; E-mail from Liane M. Moriyama, Hawaii Criminal Justice Data Center, “State of Hawaii Response to the National Sex Offender Registration Act (SORNA) 2006, to GetSMART (via email dated Aug. 6, 2007); California’s Comments on the Proposed National Guidelines to the Sex Offender Registration and Notification Act, attached to e-mail sent by California Deputy Attorney General Janet Neeley, to GetSMART (July 26, 2007) [hereinafter California Comments]; Letter from Robert S. Yeates, Executive Director Utah Commission on Criminal and Juvenile Justice, David Karp, Senior Counsel, Office of Legal Policy (March 28, 2007); Letter from Toney Newman, Alaska Division of Juvenile Justice, to Laura Rogers, Director GetSMART (Aug. 1, 2007); Letter from Richard A. Smith, Vermont Department of Children and Family Services, to Laura Rogers, Director SMART (July 27, 2007); Letter from Michael Hall, Executive Director New Mexico Sentencing Commission, to Laura Rogers, Director, SMART (July 30, 2007). The aforementioned comments are contained in AWA Comments, *supra* note 244.

<sup>248</sup> O’Donnell, *supra* note 245.

<sup>249</sup> Shimkus, *supra* note 247 (contending that the information be available only to law enforcement due to concern over “public panic” and the possibility that the information would “taint eyewitness accounts” of abductions); Flaherty, *supra* note 247 (noting numerous problems).

<sup>250</sup> California Comments, *supra* note 247.

<sup>251</sup> Moriyama, *supra* note 247; Shimkus, *supra* note 247.

<sup>252</sup> Moriyama, *supra* note 247.

<sup>253</sup> E-mail from Diane Sherman, Michigan Criminal Justice Information Center, Michigan Department of State Police, “Comments on SORNA Proposed Guidelines,” to SMART (Aug. 6, 2007), contained in AWA Comments, *supra* note 244 (“[r]etroactivity puts a work load burden on states. Much research will be needed on old laws to determine whether they apply to...registration.”); California Comments, *supra* note 247 (asserting that creation of a database containing superseded statutes of California and other states “is not a feasible project”).

- records that do not always specify the precise nature of the offense (e.g., the age of the victim, an important factor under the AWA)<sup>254</sup>;
- the three-day time period in which change of addresses by registrants must be reported<sup>255</sup>;
- the requirement that states post new registration information within three days<sup>256</sup>; and
- the requirement that registration information be updated in-person.<sup>257</sup>

States also offered more global concerns. Virginia's letter, for instance, closed by stating that the "proposed regulations would be extremely cumbersome to implement and cause Virginia to devote significant resources to the collection of information which would be of limited use. Those states with strong registration programs should have the option of implementing the proposed regulations."<sup>258</sup>

In a lengthy submission, covering ten specific concerns raised by the AWA and the proposed guidelines, the National Conference of State Legislatures excoriated SMART, writing that the guidelines "compound the burdensome, preemptive scheme of the underlying law they seek to clarify." Furthermore, the NCSL stated that it was

deeply concerned by the refusal of the SMART office to include them in the drafting and decision-making process. The drafting process should be a dialogue between the SMART office personnel and the impacted stakeholders, such as NCSL, and not the product of unelected government officials' unilateral decisions...[T]he process should be a give and take and not a decision made in a bureaucratic vacuum without the knowledge and expertise of those who would be impacted the most by such an obtrusive and overtly preemptive requirement.<sup>259</sup>

In a posting provided on its website, stating the position adopted by the group, the NCSL similarly condemned the AWA's "one-size-fits-all approach," adding that

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<sup>254</sup> California Comments, *supra* note 247.

<sup>255</sup> Sherman, *supra* note 253 (recommending that period be five days, in light of difficulties registrants can have in securing identification, and asserting that the AWA "should make it easier to register not harder.").

<sup>256</sup> California Comments, *supra* note 247 (requirement is "not feasible").

<sup>257</sup> Moriyama, *supra* note 247.

<sup>258</sup> Flaherty, *supra* note 247.

<sup>259</sup> Letter from Carl Tubbesing, Deputy Executive Director National Conference of State Legislatures, to Laura Rogers, Director, SMART (July 30, 2007), contained in AWA Comments, *supra* note 244.

These provisions preempt many state laws and create an unfunded mandate for states because there are no appropriations in the Act or in any appropriations bill. Many of the provisions of the Adam Walsh Act were crafted without state input or consideration of current state practices. The mandates imposed by the Adam Walsh Act are inflexible and, in some instances, not able to be implemented.<sup>260</sup>

In early July 2008, thirteen months after being proposed, and well after the projected three-month period of revision, the Final AWA Guidelines were released by the Attorney General. Running sixty pages in length, the Final Guidelines reflected little substantive change from those initially proposed,<sup>261</sup> with the Attorney General rebuffing state concerns either because they contradicted the terms of the AWA itself or failed to qualify as persuasive bases to alter proposed guideline requirements.<sup>262</sup> In response to state requests to loosen the AWA's requirement of "substantial implementation," the Attorney General stated that doing so would "effectively treat [the AWA] as a set of suggestions for furthering public safety in relation to released sex offenders, which would be dispensed with based on arguments that other approaches would further that general objective, though not encompassing the specific minimum measures that [the AWA]

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<sup>260</sup> See National Conference of State Legislatures, <http://www.ncsl.org/statefed/LAWANDJ.HTM> (last visited August 30, 2008). A similar sentiment was expressed in 1998 by a member of the Connecticut General Assembly, who stated that federal directives had "more to do with the needs of the home States of the various congressional committee chairs than they do with our States. I think this has been a source of great frustration for many State legislators around the country . . . 'One-size-fits-all' Federal requirements really do not apply . . . ." Mike Lawlor, *Creating Effective Sex Offender Legislation Requires Collaboration Between Lawmakers and Justice Agencies*, NATIONAL CONFERENCE OF SEX OFFENDER REGISTRIES 110 (U.S. Bureau of Justice Statistics, April 1998).

<sup>261</sup> Policy on juvenile registration is a notable exception. In response to vigorous state objections, based on a technical reading of the AWA that would require registration of juveniles for less serious offenses, such as a 14-year-old having sex with an 11-year-old, the Final Guidelines deviate from the AWA. In apparent violation of its required mandate to interpret not prescribe registration standards, the Office of the Attorney General devised a standard considerably less onerous than that tied to the "aggravated sexual abuse" standard expressly prescribed by the AWA itself (based on offenses set forth in 42 U.S.C. § 2241). Under the Guidelines, registration is required of individuals age fourteen or over adjudicated delinquent for committing (or attempting or conspiring to commit) (1) a sexual act with another involving force or threat of force and (2) a sexual act with another done by rendering the unconscious or drugging the victim. AWA Final Guidelines, *supra* note 187, at 16, 63. "Sexual act" includes genital and anal penetration as well as oral-genital and anal contact. *Id.* at 16.

<sup>262</sup> See *id.* at 62–91. Perhaps the most vivid example lies in the issue of retroactivity. Giving short shrift to state objections, the Guidelines maintain their original position, focusing instead on assertions that the policy is "unfair" or "disagreeable from the standpoint of sex offenders." *Id.* at 73–74. The Attorney General obviously felt freedom to deviate from legislative requirements with juvenile policy, see *id.*, yet to adhere rigidly to an expansive understanding of retroactivity, based on perceived statutory directive goes unexplained.

prescribes . . . .”<sup>263</sup> With the Final Guidelines in place, states are now expected to conform to federal will.

One response to the autonomy-stripping concerns noted might be the typical one offered with respect to conditional spending more generally: that states are not being forced to adopt federal strictures, but rather willingly and consciously adopt them, *quid pro quo*, in return for Byrne Program funds.<sup>264</sup> Indeed, to many commentators, the congressional *modus operandi* of conditional spending is respectful of state autonomy interests,<sup>265</sup> especially as compared to instances of exercise of Commerce Clause authority, which entail unalloyed federal command.<sup>266</sup> By using honey rather than vinegar, and in the process liberating itself from the limits of federal law limiting unfunded mandates,<sup>267</sup> and the attendant criticism typically attending such mandates,<sup>268</sup> Congress extends its policy-making bailiwick beyond that permitted by constitutional text and tradition.<sup>269</sup>

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<sup>263</sup> AWA Final Guidelines, *supra* note 187, at 75; *see also id.* at 77 (rejecting view that the AWA represents “mere advice” to states).

<sup>264</sup> *See, e.g., Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (“We have repeatedly characterized . . . Spending Clause legislation as ‘much in the nature of a *contract* . . . .’” (emphasis in original); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [S]tates agree to comply with federally imposed conditions.”); *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923) (conditional spending “imposes no obligation but simply extends an option which the State is free to accept or reject”).

<sup>265</sup> *See, e.g., Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 1010 (1995).

<sup>266</sup> With the AWA, it warrants mention, Congress has used a one-two punch, for the first time using its Commerce Clause authority to make registration failures a federal crime and authorizing the U.S. Marshals to apprehend violators. As a result, what has heretofore been a violation of state criminal law, and a matter for state law enforcement, has been channeled into the federal criminal justice system—if the federal government so wishes. *See* 18 U.S.C. § 2250 (2006). In addition, for the first time, the AWA made intra-state kidnapping a federal crime. *See* 18 U.S.C. § 1201 (2000) (criminalizing kidnapping when the offender makes use of channels or instrumentalities of interstate commerce).

<sup>267</sup> *See* Unfunded Mandate Reform Act of 1995, 2 U.S.C. § 658 (2000) (excluding from coverage duties that are imposed as a condition of receiving federal assistance); *see also* PAUL PETERSON, *THE PRICE OF FEDERALISM* 190 (1995) (noting conditional funding approach takes Wetterling outside the Act).

<sup>268</sup> *See* Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Service*, 46 VAND. L. REV. 1355, 1356 (1993) (noting that “[f]ew contemporary issues concern state and local policymakers as intensely as unfunded mandates”).

<sup>269</sup> *See* *Davis v. Monroe City Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting) (asserting that “Congress can use its Spending Clause power to pursue objectives outside [its delegated powers] by attaching conditions to the grant of federal funds. . . . [T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between the national and local spheres of interest and power by permitting the Federal

Even assuming the principled use of conditional spending, however, the story of federal intrusion with respect to registration and community notification raises some troubling issues. The first relates to the political salience of state decisions to bow to federal will. Ideally, under the quid pro quo scenario of federal conditional spending, state submission to federal will in return for federal funds permits a clear inference of state endorsement. With the AWA and its predecessor laws, this inference is clouded. Because since 1994 submission has been tied to receipt of Byrne Program funds, an important pool of money used for criminal justice administration more generally, and not funds allocated specifically for registration and community notification, accountability and transparency have been significantly compromised.

Second, serious question exists over the actual voluntariness of state submission.<sup>270</sup> Whereas until the twentieth century conditional spending by the federal government itself was controversial for its perceived impingement on state autonomy,<sup>271</sup> since then, especially with the advent of federal taxing authority,<sup>272</sup> the controversy has cooled and the federal role in state revenues has expanded.<sup>273</sup>

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Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.”).

<sup>270</sup> As Richard Stewart has observed, “‘coerc[ion]’ . . . is an unhelpful anthropomorphism. . . . The question . . . is not whether federal requirements overbear an hypostasized state ‘free will,’ but whether they unduly compromise a normative political conception of state autonomy.” Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandatory State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1254 (1977).

<sup>271</sup> See, e.g., CHARLES WARREN, CONGRESS AS SANTA CLAUS OR NATIONAL DONATIONS AND THE GENERAL WELFARE CLAUSE OF THE CONSTITUTION 36–40 (1932) (calling efforts by Congress in the early-mid 1800s to bestow land upon states in return for internal improvements “attempted bribery of the States” and behavior that made the “States dependent on Government favor and subsidy . . . .”); *id.* at 143 (urging that “[p]ublic opinion must be educated to curb the tendency to plunge the National Government into action unrelated to its proper National powers.”). See also DANIEL ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL COOPERATION IN THE NINETEENTH CENTURY (1962); Edward S. Corwin, *The Spending Power of Congress-Apropos the Maternity Act*, 36 HARV. L. REV. 548 (1922).

Indeed, in ensuing decades debate raged over the authority of Congress to exercise conditional spending authority, with Alexander Hamilton’s view that federal spending authority is broadly tied to the matters serving the nation’s “general Welfare” ultimately prevailing over that of James Madison’s narrower view that spending be limited to implementing one of Congress’s specifically enumerated powers. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994). Perhaps even more exasperating to textualists, there is no “Spending Clause” as such, with the conditional spending authority deriving rather from Art. I, sec. 8 power to spend money for the nation’s “general Welfare.” Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1235 (1994).

<sup>272</sup> See Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL’Y 129, 130–31 (1993) (asserting that the Sixteenth Amendment, authorizing the federal income tax, afforded Congress the power to “extract[] money from the now-defenseless states and offer[] to return it with strings attached. . . .”).

<sup>273</sup> Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918 n.24 (1995) (noting that from 1943–1993 federal disbursements to states increased nearly 20,000%).

In recent decades, states increasingly have come to rely on federal largesse, with thirty percent of all state budgets deriving from federal sources.<sup>274</sup> The Byrne Formula Grant Program has served as a chief federal funding source of state criminal justice activities, allocating \$5.3 billion from 1994–2004.<sup>275</sup>

While very recently Byrne funds have been dramatically slashed,<sup>276</sup> the federal “stick” has been highly effective over time.<sup>277</sup> Although there has been some state reluctance to follow federal prescriptions,<sup>278</sup> such instances have been modest and isolated, as manifest in the rapid nationwide adoption of laws in the mid-1990s. Given the broader needs served by the Byrne funds, and the pressing fiscal shortfalls now faced by states, such submission should come as no surprise, especially given the negative political consequences attending failure to secure “free money” from the federal government.<sup>279</sup> In this atmosphere, state officials have readily succumbed, allowing state criminal justice policy, as one commentator stated with regard to exercises of Spending Power more generally, to “tag along after federal money like a hungry dog.”<sup>280</sup>

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<sup>274</sup> See Federal Funds Information for States, FFIS: Your State’s Eyes and Ears in Washington, <http://www.ffis.org> (last visited April 18, 2008).

<sup>275</sup> U.S. Census Bureau, Governments Division, Federal Programs Branch, *Consolidated Federal Funds Report—Fiscal Year Multi-Byrne Formula Grant Program*, at <http://harvester.census.gov/cffr/asp/Reports.asp> (last visited September 7, 2008).

<sup>276</sup> In fiscal year 2005, the allocation was \$483 million; in 2006, \$435.6 million; and in 2007, \$107.7 million. *Id.*

<sup>277</sup> Under *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (citation omitted), federal funding pressure “might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” Since 1994, Congress has set the penalty for state noncompliance at 10% of Byrne Program funds, which compared to the 25% loss initially proposed in Congress, stands little practical chance of prompting judicial concern. Cf. William Van Alstyne, “*Thirty Pieces of Silver*” for the Rights of Your People: *Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL’Y 303, 319–20 (1993) (“Congress sets the terms of its offers quite knowingly—at just the ‘right’ level—to make them ‘irresistible’ and, accordingly, no state tends very long to resist.”).

<sup>278</sup> See *supra* notes 194–197 and accompanying text.

<sup>279</sup> See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 876 (1998). Such eagerness, it bears mention, is especially notable given vigorous state resistance to other recent federal mandates, such as the federal *No Child Left Behind Act of 2001*, which conditions state receipt of federal funds on state educational reforms—also traditionally an area of state prerogative and an initiative ridiculed as an unfunded federal mandate. See Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 897–900 (2006) (describing state-level opposition to the NCLBA). With registration and community notification, states have fallen in line much more readily, indeed expeditiously, even though the adverse federal monetary consequences pale in comparison. See *id.* at 904 (noting that the Bush Administration warned that noncompliant states risked loss of all federal educational funding for disadvantaged students). On state resistance more generally, see John Dinan, *The State of American Federalism 2007–2008: Resurgent State Influence in the National Policy Process and Continued State Policy Innovation*, 38 PUBLIUS 1 (2008).

<sup>280</sup> David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 92 (1994). See also Lynn A. Baker, *Conditional Federal Spending and States’ Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI.



This beguilement, however, does more than undermine state autonomy. It has major practical ramifications for states.<sup>281</sup> Ohio is a case in point. Lawmakers in Columbus, eager to secure “early” compliance bonuses, voted to adopt the AWA, requiring inter alia disavowal of the state’s risk-based classification regime. They did so even though the promised federal incentive money was not yet authorized, and indeed before the Attorney General issued critically important final guidelines.<sup>282</sup> The legislation, which required reclassification of the state’s 25,000 registrants,<sup>283</sup> will require hundreds of thousands, if not millions, of dollars to implement. Under Ohio’s prior law, 77% of registrants were classified in the state’s least restrictive category—“sexually oriented offender”; under the new AWA-based regime, 87% have been classified as Tier II (33%) or III (54%), with their far more onerous requirements and attendant resource demands.<sup>284</sup> Commenting on the new in-person registration requirement in particular, a spokesperson for one county sheriff’s department stated: “It’s a disaster for us . . . I think many people didn’t think this all the way through.”<sup>285</sup>

Nor did Congress provide funds to accommodate the broad gamut of related matters that carry expenses for states, including possible reductions in the number of guilty pleas (and attendant rise in jury trials) as a result of the harsher, non-discretionary AWA regime,<sup>286</sup> or costs required to handle judicial challenges prompted by changes in state laws.<sup>287</sup> The AWA’s expanded range of registerable offenses, in turn, will possibly have significant collateral effect in those jurisdictions that have state (or local) laws restricting where registrants can live,

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104, 105 (2001) (“[T]he greatest threat to state autonomy is, and has long been, Congress’s spending power.”).

<sup>281</sup> To date, despite promises by Congress to allocate necessary funds for implementation, very little money has been provided. In late April 2008, the Department of Justice awarded \$11.8 million in grants, of which \$1.8 million was earmarked for tribes. See Department of Justice Announces \$11.8 Million to Help States and Tribal Governments Comply with Adam Walsh Act, *available at* <http://www.ojp.usdoj.gov/newsroom/pressreleases/2008/smart08015.htm>.

<sup>282</sup> See Margo Pierce, *Next Comes Burning at the Stake: Is Ohio Getting Too Tough on Sex Offenders?*, CITY BEAT, Aug. 15, 2007, <http://citybeat.com/gyrobase/Content?oid=%3A014096>.

<sup>283</sup> Sharon Coolidge, *Sign-in Rules Tougher*, CINCINNATI ENQUIRER, Dec. 30, 2007, at 1B.

<sup>284</sup> See *Doe I v. Dann*, No. 1:08 CV 220 (N.D. Ohio June 9, 2008).

<sup>285</sup> Rachel Dissell & Gabriel Baird, *Ohio’s Tougher Sexual Offender Law Stalls*, CLEV. PLAIN DEALER, Jan. 21, 2008, at A3. In Nevada, which previously had a risk-based system, the number of Tier III registrants is expected to grow from about 165 to more than 2500. Editorial: Sex Offenders, LAS VEGAS REV.-J., July 3, 2008, *available at* 2008 WLNR 12574782.

<sup>286</sup> States might also face increased costs associated with an enhanced right to jury trials. While the Sixth Amendment right to a jury trial typically only extends to misconduct that results in six months or more incarceration, the AWA’s more onerous requirements might prompt courts to extend the right to such situations, which would be of importance because the AWA itself targets misdemeanants. See *State v. Fushek*, 183 P.3d 536 (Ariz. 2008).

<sup>287</sup> See California Comments, *supra* note 247 (noting likely challenges based on the more onerous requirements of the AWA).

exacerbating (from the perspective of law enforcement and registrants at least) an already vexing problem.<sup>288</sup>

### B. Decentralization

A second way in which federalism values have been trammled relates to the tenet that, by circumscribing federal authority, states will be free to enact laws reflective of local normative preferences,<sup>289</sup> and allow for a greater range of choices for the nation's residents.<sup>290</sup> As the Supreme Court has stated, "the essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."<sup>291</sup> With this diversity, greater aggregate social welfare will ideally ensue, both by virtue of residents having the capacity to "vote with their feet" when displeased with state government policy,<sup>292</sup> and the creation of conditions permitting a competition between states and the national government for the peoples' loyalty on matters of policy.<sup>293</sup>

Among the most potent criticisms of the decentralization model is that, at this point in the nation's history, American social and political life is homogenized,

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<sup>288</sup> See Logan, *supra* note 218.

<sup>289</sup> See Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . .").

<sup>290</sup> *Id.* (noting that decentralizing function of federalism increases options by "putting the States in competition for a mobile citizenry."). As Edward Rubin and Malcolm Feeley have noted, the value of decentralization is not necessarily synonymous with constitutional federalism. The former, as they point out, is a "managerial concept" entailing delegation of centralized authority to subordinate political units, whereas the latter is a "structuring principle for the system as a whole." Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910–11 (1994). In addition, as Frank Cross has observed, decentralization requires that the subunits be delegated authority by the central unit, a scenario at odds with the U.S. federal system in which states possess sovereign authority in their own right. Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 18–19 (2002). Decentralization is thus possible absent a federalist governing structure retaining independent intrinsic value of its own. See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 556 (1999).

<sup>291</sup> Addington v. Texas, 441 U.S. 418, 431 (1979). See also Danforth v. Minnesota, 128 S. Ct. 1029 (2008) ("Nonuniformity is . . . an unavoidable reality in a federalist system of government.").

<sup>292</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). See also, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 150 (2001) (the "imposition of a uniform national solution almost always will satisfy fewer people" than permitting local variation).

<sup>293</sup> See Todd E. Pettys, *Our Anti-Competitive Patriotism*, 39 U.C. DAVIS L. REV. 1353, 1358 (2006).

resulting in little meaningful policy variation.<sup>294</sup> While in general the point might be well taken, it is not true with registration and community notification policies. As is the case with corrections policies more generally, states—at least until the AWA—have manifested considerable variation with registration and notification. A significant minority, for instance, have employed risk-based classification regimes, which not only place premium importance on procedural due process for individual registrants, but also a risk tolerance: by subjecting fewer individuals to community notification, they also face false negatives (i.e., individuals not deemed sufficiently dangerous to warrant notification, but who actually do reoffend). An even larger minority of states have refused to subject juvenile offenders to registration and community notification or otherwise placed limits on the extent and duration of their eligibility.<sup>295</sup>

This variation, at first blush, would not appear to jeopardize a diversity interest, at least not one deserving attention. After all, policy variation in the community control of sex offenders is a far cry from that usually in mind when decentralization and inter-jurisdictional competition are discussed, such as that relating to tax or educational policy. While the significant transaction costs associated with changing state residences might outweigh the perceived benefits to be achieved relative to the latter policies, sufficient to chill migration,<sup>296</sup> variations in state registration and community notification regimes plausibly do not. This is so when one considers the perspectives of two key groups: community members and registrants themselves.

Community members, the primary intended beneficiaries of registration and notification laws, presumably are cognizant of the approaches taken by their state legislatures. Because any deficiencies would harm them, and not residents of other states, the resulting situation would inspire residents to either pressure policy changes in their states or exercise their exit rights. From the perspective of Congress, however, states (and their residents) should not be free to maintain such a system, a view that betrays the traditional understanding that state heterogeneity, despite its challenges, actually constitutes a benefit of the nation's decentralized governing structure.<sup>297</sup> Of course, one person's "patch-work" is another's

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<sup>294</sup> See, e.g., Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 46 (2001); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 615 (2007).

<sup>295</sup> See Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex Offender Community Notification Laws in America*, 91 CAL. L. REV. 163 (2003).

<sup>296</sup> See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 183 (1998); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 387–88 (1997).

<sup>297</sup> See Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to Do So*, 78 IND. L.J. 459, 477–83 (2003).

“diversity,”<sup>298</sup> yet whether a criminal justice policy choice is wise on its merits has heretofore not been a legitimate basis to justify federal intrusion on state authority. State policies have not endured merely as a result of federal political sufferance.<sup>299</sup>

With respect to registrants, the social value would appear attenuated at best. Why should we care in the least about ex-offenders, especially those convicted of an offense warranting registration? One need not be a bleeding-heart civil libertarian to answer. This is because of the wide swath of criminal misconduct that registration laws have often targeted, including, until *Lawrence v. Texas*, consensual adult sodomy.<sup>300</sup> Such normative preferences were permissible; individuals not wishing to be targeted could move. With the AWA, and its broadened range of registerable offenses (including misdemeanors), however, such breadth will be the national norm, and juveniles will also be forced to register. As the reach of registration has grown—thanks in significant part to federal demands—the freedom-preserving benefits of decentralized governance have been diminished.<sup>301</sup> This evolution has not only negatively impinged individual liberty; it has also limited the competitive capacity of states, which, as is their right, might wish to adopt a less inclusive approach in the interest of attracting beneficial human and social capital.<sup>302</sup>

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<sup>298</sup> As Lynn Baker has observed, “[t]he freedom of sub-national political communities to choose . . . , like any other form of ‘diversity,’ predictably results in a mixed bag of results.” Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 448 (2002).

<sup>299</sup> See William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1737, 1740 (1988) (constitutional federalism, marked by structural limits on Congress, has been replaced by “political sufferance federalism”: “it is for Congress to decide to what extent it desires to make national law . . . . Congress decides what in *its* view warrants national, uniform control.”).

<sup>300</sup> *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (noting that at least four states made consensual sodomy a registerable offense). Other examples of excessive registration requirements abound, including that of Alabama, which requires registration when one is convicted of posting an obscene bumper sticker. See Ala. Stat. § 13A-12-131 (2005). See also *Human Rights Watch, No Easy Answers: Sex Offender Laws in the US* 39–40 (2007), available at <http://hrw.org/reports/2007/us0907web.pdf> (noting *inter alia* that at least 5 states require registration for adult-prostitution-related offenses and at least 13 states require registration for public urination).

<sup>301</sup> As Seth Kreimer has noted, the “variation between states is desirable because it provides an opportunity for individual citizens to mold identities and choose their futures, and because an open national community follows from this right to experimentation . . . . Federalism preserves freedom in part by the constitutionally protected character of emigration rights . . . . [E]ach citizen may take advantage of the liberties offered by any state.” Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 981–82 (2002).

<sup>302</sup> See Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 326 (2005). For instance, a family with a juvenile household member, or an individual convicted of possessing child pornography, both within the ambit of the AWA, would be unable to affirmatively choose residence in another state based on its eschewal of the requirements.

### C. Experimentation

Finally, and related, federal intrusion has undercut the prospects for state experimentation, consistent with Justice Brandeis's famous ideal.<sup>303</sup> Criminal justice policy, especially relative to corrections, has been a fertile field for experimentation and development, leading to policy diffusion.<sup>304</sup> Such experimentation has certainly marked registration and community notification. Indeed, registration itself originated first in localities (in the Los Angeles area, in the early 1930s) and later was embraced by the states (with California adopting the first state-wide registration law, in 1947). Likewise, notification originated in Washington State (in 1990), and like registration, has constantly evolved. Most recently, states have been engaged in public debate over whether a conviction or risk-based registration classification scheme is preferable.<sup>305</sup> The policy debate was perhaps most visible in Maine, where residents and lawmakers in 2006 were engaged in heated discussion over continued use of the state's conviction-based Internet registry after the vigilante killing of two registrants, one of whom had been convicted of "Romeo and Juliet" underage sexual misconduct.<sup>306</sup> Similar debates have ensued over the appropriateness of requiring adjudicated juveniles to register and be subject to community notification.<sup>307</sup>

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<sup>303</sup> See *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (asserting that individual states can serve as "laborator[ies]" and undertake "experiments without risk to the rest of the country"); see also *Gregory*, 501 U.S. at 458 (the nation's "federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government").

<sup>304</sup> See Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1295 (1995) (noting that "[m]any of the most promising trends in criminal law enforcement began at the state and local level, including specialized drug courts, community policing . . . and sentencing guidelines").

It is also worth mentioning that such reforms are not susceptible of the influential critique of Professor Susan Rose-Ackerman that states cannot be counted on to be engines of experimentation because they fear that other jurisdictions will "steal" their ideas. Under this view, states will naturally free-ride on the innovations of others, and so too will risk-averse incumbent political actors who have little incentive to experiment and hence risk electoral punishment. Under such circumstances, a collective action problem arises ripe for intervention by another actor, such as the federal government. See Susan Rose-Ackerman, *Risk Taking and ReElection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980). With criminal justice, unlike areas such as corporate law, states are not motivated to entice businesses with corresponding negative consequences for other states, providing an incentive to poach attractive policies.

<sup>305</sup> For discussion of the relative merits of the two approaches, see Wayne A. Logan, *Sex Offender Registration and Community Notification Policy: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 13–14 (2008).

<sup>306</sup> See David Hench, *Panel to Consider Adding Details to Sex Offender List*, PORTLAND PRESS HERALD, July 23, 2006, at A1.

<sup>307</sup> See, e.g., 95<sup>th</sup> Ill. Gen. Assem., Senate Proceedings, May 1, 2007, available at <http://www.ilga.gov/senate/transcripts/strans95/09500033.pdf> (Illinois Senate floor debate).

Federal intrusion has quelled this discussion, disrupting what has been an ongoing natural experiment. With Wetterling, in 1994, the states were pressured to adopt registration laws, and with Megan's Law in 1996, community notification. As a result, with possible control states (those without laws) taken out of the equation, basic research into the efficacy of the two social control strategies was precluded. Nevertheless, because federal law served as a comparatively modest and flexible "floor" for states, leaving them free to reach independent determinations, the opportunity for comparative empirical work on the particulars of the laws existed.<sup>308</sup>

With the AWA's enactment in 2006, the prospects for experimentation have been greatly diminished. States are obliged to adopt federal requirements of a significantly broadened cast, including the scope of registration eligibility, increased durations of coverage, in-person verification, registration of juveniles and retroactive application, complemented by a conviction-based classification scheme.<sup>309</sup> This even though Congress contemporaneously directed (for the first time) that empirical evaluation be undertaken on the relative efficacy of the competing classification regimes and the effectiveness of registration and notification more generally,<sup>310</sup> which itself sharply undercuts confidence in any assertion that the AWA's expansive set of prescriptions is optimal and warrants nationwide application.

#### D. *Whither (Better Yet: Wither) Federalism?*

Despite the foregoing federalism-based concerns, the extended federal intrusion has inspired little resistance. In Congress, the most common ardent supporters of states' rights—conservative Republicans—have remained silent.<sup>311</sup>

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<sup>308</sup> Alas, however, meaningful work never came to pass. How and why a social experiment of such a magnitude avoided empirical evaluation remains one of the most curious aspects of the history of registration and notification. For discussion of why this likely occurred, see LOGAN, KNOWLEDGE AS POWER, *supra* note 7, chs. 4 & 7.

<sup>309</sup> See J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. CAL. L. REV. 523, 525 (2001) ("The debate . . . is likely to be a much less informed one if federal rules replace the different state experiments.").

<sup>310</sup> 42 U.S.C. §§ 16990–16991 (2006).

<sup>311</sup> As noted by Professor Kadish, the incongruity is not unusual for federal criminal justice initiatives. "It is curious . . . that crime is the one area of traditional state and local concern where even strongly federally oriented politicians often support national intervention . . . . In [the areas of health care or welfare] the same politicians pushing for increased federal criminal legislation turn into ardent federalists." Sanford H. Kadish, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1247 (1995). Nor need one need look far for examples of other inconsistencies, including the zealous efforts of Republican lawmakers to trump decisions by sovereign state courts in Florida in their efforts to super-impose federal will in the Terry Schiavo case. See John Dinan & Dale Krane, *The State of American Federalism, 2005: Federalism Resurfaces in the Political Debate*, 36 PUBLIUS 327 (2006).

To the extent federalism objections were voiced, they came from liberal Democrats.<sup>312</sup> In 1994, for instance, Representative Jerry Nadler (D-NY) repeatedly spoke out on the federalism implications of the proposed Wetterling Act:

What we are attempting to do here . . . is to mandate the States to enact a State criminal law and a State criminal [law] program . . . . We are mandating the States under threat of withholding Federal funds as to a criminal law they are to enact. The Federal Government should not be in the business generally of enacting and writing local State criminal laws. That is the business of the State. The State legislature has ample policy arguments on both sides.<sup>313</sup>

. . .

When I hear [a colleague] stand up here and say that it is all of our responsibility, sure, it is all of our responsibility, but in this country we leave general decisions of criminal law generally to the States . . . . In fact, . . . we are saying to the State, "If you do not do it exactly the way we tell you to do it, then we are going to take Federal funds away from you and we are going to mandate it . . . ." This is telling the States, "We know how best to do it, we are telling you how to do it in the States," and that is not something we ought to be doing in the criminal law . . . , especially when there are strong policy arguments that this particular

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Of course, Democrats also show a circumstantial feat to federalism. Indeed, the very same month that President Clinton endorsed Megan's Law, he vetoed the "Common Sense Product Liability Reform Act," which was motivated by concern over state law variations and damage awards, publicly stating that the bill would "inappropriately intrude[] on state authority." Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996, at A1. See also Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 265 (1990) (noting that "[c]onservatives and liberals alike extol the virtues of state autonomy whenever deference to the states happens to serve their political needs at a particular moment").

<sup>312</sup> Conservatives did raise federalism-based concern in one instance. The issue arose in 1997 in the context of an effort to strengthen registration provisions, and centered on the decision of at least four states to require registration of adults convicted of consensual sodomy. In response, Representative Chuck Schumer (D-NY), a strong supporter of federal registration laws, offered an amendment before the House Judiciary Committee that such states would be disqualified from receiving federal funds. The amendment was defeated on the rationale that it would intrude on the policy making authority of states. Dissenting members of the House Judiciary Committee, all Democrats, called the federalism argument "specious," noting that the proposed legislation already "impose[d] a multitude of requirements on states." Comm. on the Judiciary Report, Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Improvements Act of 1997, H.R. Rep. No. 105-256 at 41-42 (1997).

<sup>313</sup> 140 CONG. REC. H5612, 5613 (daily ed. July 13, 1994) (statement of Rep. Nadler).

solution to this problem has real problems with it. Let the State legislature deal with the specifics of how to deal with this.<sup>314</sup>

Similarly, in 1996, Representative Mel Watt (D-NC), while initially inclined to remain silent due to the “difficulty of the issue,” ultimately exhorted his colleagues to “stand up for the Constitution and stand up for States['] rights” and oppose [the federal Megan’s Law].<sup>315</sup> Watt stated that “in this area, somehow or another we cannot seem to justify allowing states to make their own decisions . . . . All of a sudden Big Brother Government must direct the states to do something that is not even necessarily a Federal issue.”<sup>316</sup> As with Nadler in 1994, however, Watt’s sentiment was forlorn and the legislation was passed with overwhelming support (including, ultimately, the affirmative vote of Watt himself)<sup>317</sup> and signed by President Clinton in a moving Rose Garden ceremony in which the President, with Maureen Kanka at his side, endorsed a nationalization theme: “Today America warns: If you dare to prey on our children, the law will follow you wherever you go. State to State, town to town. . . . Today, America circles the wagon[s] around our children.”<sup>318</sup>

A similar reticence marked evolution of the AWA. While federalism concern was expressly voiced by outside parties in a handful of letters made a part of the House Record,<sup>319</sup> such concern was only indirectly raised on the floor, with witnesses and representatives alike downplaying any effect, itself trumped by the avowed need for national intervention.<sup>320</sup> In the Senate, Senator Patrick Leahy (D-VT) expressed concern over the AWA’s required registration of juveniles but

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<sup>314</sup> *Id.* at H5616.

<sup>315</sup> 140 CONG. REC. H4451, 4456 (daily ed. May 7, 1996) (statement of Rep. Watt).

<sup>316</sup> *Id.*

<sup>317</sup> See *supra* note 115 and accompanying text. The House Report, containing “additional views,” also omitted any express concern over federalism. See H.R. REP. NO. 104-555 (1996); Pub. L. No. 104-145, 110 Stat. 1345 (1996).

<sup>318</sup> Remarks on Signing Megan’s Law and an Exchange with Reporters, 1 PUB. PAPERS 763–764 (1996).

<sup>319</sup> See 152 CONG. REC. H690 (daily ed. Mar. 8, 2006) (statement of the American Civil Liberties Union); H.R. REP. NO. 218, pt. 1, at 285 (2005); 152 CONG. REC. H687-89 (daily ed. Mar. 8, 2006) (statement of Michael Z. Buncher, Deputy Public Defender, New Jersey); 152 CONG. REC. H686 (daily ed. Mar. 8, 2006) (statement of Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States).

<sup>320</sup> See *House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1355, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 26 (2005) (statements of Rep. Gohmert and Rep. Poe); *Id.* at 30 (statement of Rep. Brown-Waite); *Protecting Our Nation’s Children from Sexual Predators and Violent Criminals: What Needs to be Done? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 33 (2005) (statement of Tracy A. Henke, Deputy Associate Attorney General, U.S. Department of Justice).



ultimately concluded that the bill struck “an acceptable balance” and vaguely related that he was “glad that those of us who were concerned about appropriate deference to the expertise of the States spoke out and were heard to some extent.”<sup>321</sup> Senator Edward Kennedy (D-MA) expressed the sole other concern, again indirectly, by lauding what he termed the “compromise” allowing states with a risk-based regime (such as his home state of Massachusetts), which he characterized as “go[ing] beyond” the “basic requirements” of the AWA “by providing individualized risk assessments of each sex offender who goes on the registry.” By “compromise” the senator referred to the AWA provision noted above that possibly allows deviation from the AWA’s regime in the event a state’s highest court finds that such deviation is constitutionally compelled, such as has been the case with the evolution of the risk-based regime in Massachusetts.<sup>322</sup> Massachusetts, Kennedy stated,

has been vigilant in implementing a comprehensive and effective sex offender registry, and it should not lose much needed Federal funding where there is a demonstrated inability to comply with . . . this new Federal law.

No state should be penalized and lose critical Federal funding for law enforcement programs as long as reasonable efforts are under way to implement procedures consistent with the purposes of the act. It is essential that the Federal Government continue to collaborate and to provide support for State and local governments . . .<sup>323</sup>

Time will tell whether the “compromise” Senator Kennedy alluded to, which he termed “very important,” will protect the autonomy of jurisdictions such as Massachusetts. However, as noted above, requiring states to achieve “substantial implementation” of and “compliance” with a federal directive, calling any barrier a state constitutional “problem,” and requiring a state to “consult” with the U.S., hardly manifests much fealty to federalism.<sup>324</sup> Moreover, even if Senator Kennedy’s faith in the deferential capacity of the Attorney General to broker a state constitutional compromise is ultimately warranted, the litany of conflicting state statutes, rules, and policies, themselves not constitutionally commanded, will be accorded no deference.

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<sup>321</sup> 152 CONG. REC. S8012, S8027 (daily ed. July 20, 2006) (statement of Sen. Leahy).

<sup>322</sup> *Id.* at S8023 (daily ed. July 20, 2006) (statement of Sen. Kennedy) (“Each State will face challenges in the implementation of these new Federal requirements, and States should not be penalized if exact compliance with the [AWA’s] requirements would place the State in violation of its constitution or an interpretation of the State’s constitution by its highest court.”).

<sup>323</sup> *Id.*

<sup>324</sup> See *supra* notes 232–235 and accompanying text.

To students of state-federal relations, the foregoing account should come as no surprise. In contemporary times, in contrast to the past,<sup>325</sup> federalism has decidedly ranked as a second-order concern,<sup>326</sup> with preferred substantive policies—certainly relative to criminal justice—reigning supreme.<sup>327</sup> With registration and notification in particular, federal actors have been allured by enormous political benefits and faced no political risk. Moreover, there has been scant push-back from the states. Wary of being tagged as “soft” on sex offenders or being an obstacle to the securing of “free” federal money, state legislators have readily fallen in line.<sup>328</sup>

In assessing this political dynamic, it is important to note that public discourse has never been meaningfully affected by the federalism implications of federal mandates. If the terms of the debate were to be recast, if federalism were to figure meaningfully in the political discourse, the outcome might well have been different.<sup>329</sup> As has been observed with opinion surveys seeking to plumb public sentiment, including the death penalty,<sup>330</sup> it very much matters how a public policy matter is couched. If federalism was salient in debate over enactment of registration and community notification laws, then resistance from state residents might filter up to federal law-makers, as Herbert Wechsler’s political safeguards

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<sup>325</sup> See *supra* notes 14–19 and accompanying text. Such concern, it should be recognized, was not uniform. That this was so was evidenced by Representative Thetus Sims (D-TN), who in 1910 inveighed against what he saw as undue federalism concern prompted by the Mann Act, which eventually passed by voice vote: “how any man can haggle or higggle over a constitutional provision” in the face of “white slave” traffic “is more than I can [imagine].” 45 CONG. REC. 811 (1910).

<sup>326</sup> See generally Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 131–37 (2004).

<sup>327</sup> See William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 724 (1995) (“It may win votes . . . to claim that one is in favor of returning power to the state—it is seldom a vote winner to assert that one is not going to vote for a popular criminal measure on the grounds that it conflicts with a theoretical vision of federalism.”).

<sup>328</sup> The reaction parallels the behavior of states more generally down the years when the federal government enacts criminal laws permitting concurrent jurisdiction (e.g., drug or firearm offenses) and states mount little resistance. See Richman, *supra* note 39, at 404–05. But as noted at the outset, such silence might be in large part explained by the reality that with concurrent federalization states benefit from the U.S. handling a part (albeit small) of their workloads. Here, federal action only serves to increase the burden on states.

<sup>329</sup> Standing up for federalism potentially raises a complicated question for federal legislators, especially liberals, given the doctrine’s historic deployment by opponents of civil rights and New Deal-era initiatives. Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1065 (1995). However, it is important to recognize that states’ rights swing both ways. See Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 448 (2002) (noting that the doctrine has been invoked to preserve racial hegemony (e.g., resisting federal anti-lynching laws) and to preserve individual liberty (e.g., resisting federal laws condoning or facilitating slavery)).

<sup>330</sup> See Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1370 (2002).

model would dictate.<sup>331</sup> Support for this possibility lies in surveys showing that citizen opinions on preferred allocation of governmental authority varies in accord with policy area, with criminal justice decidedly being within the ambit of state (and local) government.<sup>332</sup> As Cindy Kam and Robert Mikos observe, “by exposing the public to federalism appeals . . . , elite debate can make federalism a more salient consideration in the minds of citizens.”<sup>333</sup> However, such attention (from state and federal lawmakers alike) has not been in evidence with registration and community notification, removing what might be a hedge against federal intrusion.

#### IV. NATIONAL CRIMINAL JUSTICE POLICY

The preceding discussion highlighted basic doctrinal objections to federal intrusion. Yet such objections arguably only go so far, as critics of “abstract”<sup>334</sup> or “puppy”<sup>335</sup> federalism are wont to assert. Importantly, in themselves they do not resolve the question of whether national criminal justice policy, deriving from the federal legislative process, is predisposed to being inferior to that deriving from states. Nor, presuming the epistemic appeal of a federal policy-making role, does the foregoing determine what form such a policy should take. This Part first considers whether the federal law-making process is well-suited to the task of enlightened criminal justice policy creation, using the history of registration and community notification as a case study. Later, assuming suitability of a federal role, discussion turns to the question of what form federal policy should assume.

##### A. *The U.S. as a Central Planner*

Historically, federal involvement in policy-making has been thought to have several benefits. Most significant, the national legislative process itself has been regarded as superior because it is executed, in James Madison’s words, by leaders more likely to have “enlightened views and virtuous sentiments [that] render them

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<sup>331</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

<sup>332</sup> See PHILLIP W. ROEDER, PUBLIC OPINION AND POLICY LEADERSHIP IN THE AMERICAN STATES 99, 116, 203 (1994).

<sup>333</sup> Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1715 (2007).

<sup>334</sup> See, e.g., Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008).

<sup>335</sup> See Rubin & Feeley, *supra* note 294. But see *New York v. United States*, 505 U.S. 144, 157 (1992) (stating that deference to federalism is warranted “even if one could prove that [it] secured no advantages to anyone”).

superior to local prejudices and to schemes of injustice[.]”<sup>336</sup> The federal process, it is said, can “readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy.”<sup>337</sup> In devising policy outcomes, it can also utilize subcommittees with special expertise on particular issues, augmented by access to superior resources for research and analysis.<sup>338</sup> As a result of these features, the federal policy-making apparatus can be expected to achieve optimized policy outcomes.

Little evidence exists, however, that this idealized scenario reflects reality. Congress, it is widely acknowledged, often suffers from dysfunctional paralysis, so much so that states have taken the lead in numerous areas of national significance, including environmental protection, immigration, health care, and welfare reform.<sup>339</sup> Worse yet, when Congress does act, the prevailing institutional dynamic is such that it fails to inspire optimism, with the non-deliberative methods characteristic of more recent Congresses,<sup>340</sup> aversion for expert input,<sup>341</sup> and undue interest group influence<sup>342</sup> raising particular concern.

Congressional dysfunction is especially evident with criminal justice policy. As Rachel Barkow has observed, when it comes to criminal justice Congress is predisposed to enact laws of “the ‘feel-good, do-something’ variety rather than to seek out the most cost-effective way to address a particular problem.”<sup>343</sup> One need

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<sup>336</sup> See THE FEDERALIST NO. 10, at 83–84 (James Madison) (Clinton Rossiter ed., 1961). Hamilton contended that while initially individuals would repose greater trust in their state leaders, this would change over time if the federal government excelled and the states faltered. See THE FEDERALIST NO. 17, *supra* at 1199 (Alexander Hamilton).

<sup>337</sup> Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting).

<sup>338</sup> See Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 209 (1971); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1179 (2001).

<sup>339</sup> This is not to say, of course, that vertical (state-federal) policy diffusion does not occur in the reverse, with the federal government at times acting in an agenda-setting capacity by highlighting the need to act on issues and inspiring states to pursue innovations considered but not acted upon by Congress. For discussion of several such instances since the 1980s (e.g., medical savings accounts after Congress failed to enact the Health Security Act), see ANDREW KARCH, *DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES* 67–103 (2007).

<sup>340</sup> See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (3d ed. 2007).

<sup>341</sup> See Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne’s Testimony*, 54 DUKE L.J. 1525 (2005).

<sup>342</sup> See J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1539–40 (2007).

<sup>343</sup> Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1303 (2005). See also David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 121–22 (2001) (observing that the political symbolism of crime “is much easier when it is disconnected from the reality of managing scarce resources”). As Professor Barkow has observed elsewhere:

look far for support for these assertions, including the ongoing federal proclivity for get-tough policies resulting in mass incarceration,<sup>344</sup> which stand in stark contrast to state efforts to scale back use of harsh mandatory minimums, enhance use of community corrections, and pursue evidence-based programmatic efforts intended to lower recidivism and enhance public safety.<sup>345</sup> “When severity is politically costless,” as it is for Congress, as William Stuntz has observed, “one can expect to see severe laws.”<sup>346</sup>

This orientation, in turn, is affected by a variety of factors that distinguish criminal justice from other policy areas. Notably, unlike other areas attracting the attention of Congress, criminal justice is often driven and justified by “common sense,” which can moot any possible perceived need for expert input. Moreover, unlike other areas in which Congress often seeks to intrude on state prerogative—such as securities or environmental regulation, products liability, or electronic identity theft—the impetus for change does not come from politically powerful private sector entities, themselves often opposed by public interest groups.<sup>347</sup>

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Groups representing the interests of defendants are politically weak at all levels of government, but it is more likely that advocates making arguments for shorter sentences on the basis of cost concerns will have more sway at the state level. States are more sensitive to sentencing costs because . . . states cannot carry deficits to pay for their crime policies. As a result, state actors tend to see the budget in zero-sum terms, and crime expenditures are viewed with greater scrutiny because money saved on incarceration costs could be spent elsewhere.

Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1721 (2006). See also Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 774–75 (2005) (noting comparative absence of fiscal constraint operative on Congress).

<sup>344</sup> While state prison populations increased 300% from 1980–2001, the growth in federal prison populations was 600%. Paige M. Harrison & Allen J. Beck, *Prisoners in 2001*, (U.S. Dep’t of Just., Wash., D.C.) BUREAU OF JUST. STAT. BULL., July 2002, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf>.

<sup>345</sup> See generally ALISON LAWRENCE, NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE SENTENCING AND CORRECTIONS LEGISLATION: 2007 ACTION, 2008 OUTLOOK (Jan. 2008), available at <http://www.ncsl.org/print/cj/07sentencingreport.pdf>.

<sup>346</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 806 (2006).

<sup>347</sup> See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19–20 (2007). As Professor Hills notes, state laws “are an important influence on Congress’s agenda. They spur interest groups to raise issues that might otherwise never receive congressional attention.” *Id.* at 20. For instance, the “patchwork” of more stringent (not lax, as with the AWA) state laws relating to health, safety and environmental concerns have prompted industry to seek uniform (and less onerous) standards in Congress. See Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, N.Y. TIMES, Sept. 16, 2007 at A1. For discussion of why interest groups are especially predisposed to seek out national legislative solutions, as opposed to those at the state level, see Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271–73 (1990).

Rather, policy entrepreneurs<sup>348</sup> are very often members of Congress who stand to gain substantial political benefit and face little organized opposition.<sup>349</sup>

The history of federal registration and community notification laws provides a compelling case study of these tendencies. Congress, in tandem with election cycles,<sup>350</sup> has created and imposed from on-high policies that it knows will not have significant impact on the federal criminal justice system.<sup>351</sup> Unlike even the federalization of crime, where federal resources (however modest) must be dedicated to enforcement, the burdens and costs of registration and notification fall squarely on the states,<sup>352</sup> without need for significant additional budgetary allocations from Congress (other than that already allocated under the Byrne Program).<sup>353</sup> So liberated, members of Congress adopt whatever policies they desire, secure in the knowledge of the major political benefits of backing laws that are not only tough on despised sex offenders,<sup>354</sup> but that also exalt the memory of highly sympathetic individual victims such as Jacob Wetterling, Megan Kanka, and Adam Walsh.<sup>355</sup>

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<sup>348</sup> On the role of such agents in the federal legislative process more generally, see MARK SCHNEIDER ET AL., *PUBLIC ENTREPRENEURS: AGENTS FOR CHANGE IN AMERICAN GOVERNMENT* (1995).

<sup>349</sup> See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 729 (2005) (noting that “unlike most areas of regulation, criminal law features pro-regulatory forces that are strong and unified and face little coordinated opposition”).

<sup>350</sup> On this tendency more generally, see ANTHONY KING, *RUNNING SCARED: WHY AMERICA’S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE* 154 tbl.3 (1997).

<sup>351</sup> Indeed, even individuals convicted of federal crimes will not be subject to federal registration, but rather will be the responsibility of the state registration systems. See AWA Final Guidelines, *supra* note 187, at 47.

<sup>352</sup> The AWA provision permitting federal prosecution of interstate registration violations is an exception. It is highly unlikely, however, that many federal prosecutions will be mounted. Even if of mainly symbolic importance, the federal failure-to-register provision sends an important message: that the states cannot handle registration violations themselves and that the federal government must come to the rescue. See Wayne A. Logan, *Sex Offender Registration: Federal Prosecution*, NAT’L L.J., Mar. 5, 2007, at 23.

<sup>353</sup> See *supra* note 281 (discussing modest grants for implementing AWA thus far announced by the Department of Justice).

<sup>354</sup> See Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 323–25 (2003) (noting strong political appeal of anti-sex offender laws).

<sup>355</sup> The AWA marks the zenith of this personalization. Not only is the AWA named after a victim but it also enshrines the names of 17 other victims in its “declaration of purpose,” along with their brief personal descriptions and the accounts of their victimizations. The law was enacted “to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims . . .” specified. 42 U.S.C. § 16901 (2006). Furthermore, personalization is reflected in particular parts of the AWA itself. Seemingly wary of in any way besmirching the memory of prior namesakes, Congress established as a constituent part of the AWA “the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Community Notification Program,” victims already named in the list of seventeen. 42 U.S.C. § 16902 (2006).

The legislative process leading to passage of the laws has been symptomatic of the aforementioned impoverishment, with the evolution of the Adam Walsh Act AWA again serving as a telling example. Although several years in the making, the AWA derived from a troubling fast-track *modus operandi*. The originating legislation (H.R. 3132) passed on September 14, 2005, by voice vote, and six months later the bill was again before the House, this time minus Democrat sponsored amendments targeting hate crimes and a provision banning the sale of firearms to persons convicted of sex crimes. Shepherded by the Republican leadership through the House under suspension of the rules without debate, apparently due to concerns over the amendments, the new bill (H.R. 4472) again passed by voice vote on March 8, 2006.<sup>356</sup> The summary process, following a similarly truncated consideration of Megan's Law a decade earlier,<sup>357</sup> prompted the following statement from Representative John Conyers (D-MI):

I rise in strong opposition to this legislation and the manner by which it comes before us today. [T]his legislation, all 164 pages, has managed to completely circumvent the traditional legislative process.

Without the benefit of a single hearing or committee markup, the legislation has somehow found its way here to the floor of the House of Representatives. To make matters worse, it's being considered under suspension of the rules, leaving [members] with reasonable concerns no opportunity to offer modest amendments . . . .

After criticizing the omission of the hate crimes and the firearms ban provisions, Representative Conyers spoke directly to the lack of scrutiny associated with the bill's adoption of a conviction-based classification scheme:

[T]he measure under consideration today includes a complex system of categories whereby sex offenders are classified based upon the nature of their offense. They are also routinely forced to verify the accuracy of their registry information based upon this system.

This new system of registration and registry verification has never been discussed by members of [the House Judiciary] [C]ommittee. While some may certainly welcome such a system, others most likely will not.

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<sup>356</sup> Seth Stern, *House Moves on Anti-Crime Package*, CONG. Q. WEEKLY, Mar. 13, 2006, at 709.

<sup>357</sup> See 142 CONG. REC. H11,049, H11,133 (daily ed. Sept. 25, 1996) (statement of Rep. Watt) (noting that the bill was not subject to House Judiciary Committee consideration).

In either event, a change of this magnitude should not be undertaken without adequate thought, consideration and debate.<sup>358</sup>

Attention then shifted to the Senate, which on May 4, 2006, adopted a markedly different approach, including, *inter alia*, a provision affording states significant latitude in registrant classification decisions and excluding juveniles from registration and community notification.<sup>359</sup>

Two months later, what came to be the AWA emerged for vote, with the conviction-based regime and other trappings of the original House bill (including the required registration of juveniles) intact. With the only mention of the inscrutable process coming from Senator Kennedy (D-MA), who adverted to “difficult compromises” that had to be made,<sup>360</sup> the bill passed in both the Senate (July 20) and House (July 25) by voice vote.

The AWA’s passage also affords a compelling example of congressional disinterest in expert input. Emblematic of this, in June 2005, a key formative phase of the AWA, the House Judiciary Committee received testimony from:

- Representatives Foley (R-FL), Poe (R-TX), Brown-Waite (R-FL), and Pomeroy (D-ND);
- Tracy Henke (Deputy Attorney General, U.S. Department of Justice);
- Laura Parsky (Deputy Assistant Attorney General, U.S. Department of Justice);
- Charlie Crist (Attorney General of Florida);
- Ernie Allen (President and CEO, National Center for Missing and Exploited Children);
- Amie Zyla (a child victim of sexual assault);
- Carol Fornoff (mother of a murdered child);
- John Rhodes (Assistant Federal Public Defender, Montana); and
- Fred Berlin (Associate Professor, Psychiatry, Johns Hopkins University School of Medicine).<sup>361</sup>

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<sup>358</sup> 152 CONG. REC. H677 (daily ed. March 8, 2006) (statement of Rep. Conyers).

<sup>359</sup> 152 CONG. REC. S4079 (daily ed. May 4, 2006). With respect to classification, the bill provided that “[t]he tier designation of an individual shall be determined under criteria promulgated by the participating State in accordance with the participating State’s resources and local priorities.” *Id.* at S4086.

<sup>360</sup> 152 CONG. REC. 8022 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

<sup>361</sup> Also, the House Record for March 8, 2006, contains letters with critical analysis of various provisions of the House legislation from the Association for the Treatment of Sex Offenders; State of New Jersey, Office of the Public Defender; the American Civil Liberties Union; and Human Rights Watch. *See* 152 CONG. REC. H657, 687–691 (daily ed. Mar. 8, 2006).



Other than Dr. Berlin, no individual offered critical analysis of registration or community notification in general<sup>362</sup> or the provisions of the proposed legislation in particular,<sup>363</sup> and Berlin was subjected to extended political monologs and few substantive questions. Witness Foley, a co-sponsor of the bill, and chair of the “Congressional Missing and Exploited Children’s Caucus,” who himself was later forced to resign due to his misbehavior with adolescent male staffers, mistakenly intoned that only “most states have some form of registry”<sup>364</sup> (when of course *all* states do).

Perhaps more important, so far as the formal record reveals, other than Florida Attorney General Crist, an advocate of the bill, no input was sought from or provided by state and local authorities, who not only would be tasked with implementing the new registration and community notification policies, but also have extensive experience with the challenges posed by registration and notification. The central feature of the AWA’s regime, the conviction-based classification approach, closely resembles the approach of Delaware, one of the nation’s smallest states (home to Joseph Biden, a co-sponsor of the AWA). Even more remarkable, is the decision of Congress to impose uniform registration and community notification requirements, despite not only the ongoing lack of empirical evidence of the public safety benefits of registration and notification more generally, but also the specific requirements mandated (e.g., conviction based approach, frequent in-person verification, and targeting juveniles).<sup>365</sup>

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<sup>362</sup> See *Protecting Our Nation’s Children from Sexual Predators and Violent Criminals: What Needs to be Done? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 22 (2005) (statement of Fred Berlin, M.D., Associate Professor, Johns Hopkins University) (noting that “the verdict is not yet in on whether [community notification] is proving to be successful” and expressing concern that it merely encourages registrants to commit crimes in communities where they are not known; identifying need for research into whether community notification will drive registrants “underground”; and that community notification might identify incest victims and perhaps discourage reporting of incest).

<sup>363</sup> Federal Defender Rhodes did raise significant questions over the bill’s proposed significantly enhanced penalties for federal sex offenses, which he condemned for having adverse impact on those committing crimes on Indian reservations. See *Protection Against Sexual Exploitation of Children Act of 2005, and the Prevention and Deterrence of Crimes Against Children Act of 2005: Hearing on H.R. 2318 and H.R. 2388 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 38 (2005) (statement of John Rhodes, Assistant Federal Defender, Montana).

<sup>364</sup> *House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1355, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 6 (2005) (statement of Rep. Foley). A similar lack of basic familiarity was evidenced in the statement of Representative James Gillmor (R-VA), who offered that “[c]urrently, each state classifies offenders differently according to the risk they pose to the community,” when of course most states do not use individualized risk determinations at all. 152 Cong. Rec. H680 (daily ed. Mar. 8, 2006) (statement of Rep. Gillmor).

<sup>365</sup> Notably, the only evidence of Congress’s willingness to consult states came after the fact, with its directive to the Attorney General to conduct future studies on the comparative benefits of risk

Finally, the above-described legislative deficiencies were in no sense ameliorated by the involvement of the executive branch. While of late, commentators have argued in favor of the redemptive benefit of executive rule-making, asserting, *inter alia*, its utility in mitigating common public choice and federalism deficiencies of Congress,<sup>366</sup> the executive's role in refining the AWA cannot be counted among such successes.<sup>367</sup> As noted above, the Attorney General's efforts have been marked by a steadfast insularity from state and expert input, delay, and disregard for federalism concerns.<sup>368</sup>

The point of the foregoing is not to say that state legislative consideration of registration and community notification has always been superior. State laws, too, have often been fast-tracked and devoid of expert input.<sup>369</sup> Nor is it accurate to say that state registration and community notification laws are as a rule more measured or enlightened than those emanating from Congress.<sup>370</sup>

Important differences do exist, however, perhaps explaining to some degree the quality of federal law. In states, at least some nominal resistance has manifested, *i.e.*, an actual "debate" has occurred. Such was the case in Minnesota, for instance, the home of Jacob Wetterling, the location of the influential

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and conviction-based classification methods. The Attorney General is to assemble a task force consisting of persons who "represent national, State, and local interests" and possess expertise in relevant academic and experiential areas. *See* Pub. L. No. 109-248, § 637, 120 Stat. 637 (2006).

<sup>366</sup> *See, e.g.*, Brian Galle & Mark Seidenfeld, *Admin Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008).

<sup>367</sup> Whether congressional delegation of authority under the AWA was itself warranted is subject to question. To date, delegation-based challenges to the Attorney General's decision on the retroactive application of the AWA, in particular, have failed. *See, e.g.*, *United States v. Samuels*, 543 F. Supp. 2d 669 (E.D. Ky. 2008). However, it is arguable whether these outcomes, and the more general desuetude of the non-delegation doctrine itself, are justified. Not only do the policy matters in question have unique normative importance affecting the liberty of individual citizens, but they also lack the technical complexity that typically justifies delegation based on agency expertise, not to mention the need for insulation from undue political influence (such as with environmental regulations). Moreover, unlike the U.S. Sentencing Guidelines, promulgated by the U.S. Sentencing Commission, federal guidelines issued since Wetterling have never been subject to even nominal congressional oversight and approval, further undercutting political salience and accountability.

<sup>368</sup> *See supra* notes 236–263 and accompanying text. With respect to federalism in particular, the process betrayed ostensible executive sensitivity to federalism, as embodied in Executive Order 13,132 which discourages "one-size-fits-all approaches to public policy problems" and urges the national government to be "deferential to the States when taking action that affects the policymaking discretion of the States..." or when there are "uncertainties regarding constitutional or statutory authority of the national government." Exec. Order 13,132(2), 64 Fed. Reg. 43255 (1999).

<sup>369</sup> For a detailed overview of this history see LOGAN, KNOWLEDGE AS POWER, *supra* note 7, ch. 3.

<sup>370</sup> States, for instance, have succumbed to the temptation to proliferate registration eligibility criteria beyond reason (*e.g.*, posting an obscene bumper sticker in Alabama, or "Romeo and Juliet" encounters between teens in several states) and imposed draconian community notification regimes (*e.g.*, requiring that registrants inform neighbors of their presence in the community in Louisiana).

Wetterling Foundation (founded by his mother Patty), and the fifteenth state to adopt a sex offender registration requirement (in 1991). From the outset, the bills and amendments introduced by members were measured in tone and conscious of the practical difficulties and possible negative constitutional implications of registration.<sup>371</sup> Concerns over constitutionality were publicly expressed by even the state's Republican Governor, Arne Carlson.<sup>372</sup> In ensuing years, amid several widely reported sexual victimizations of women and children, the state's registration law grew in scope and came to be complemented by community notification, yet critical testimony and debate remained the political norm.<sup>373</sup> The outcome has been a provision decidedly less onerous than the AWA (including the provision of extensive due process protections for registrants in its risk-based classification regime). A similar measured course of events marked the origin and evolution of New York's registration and notification regime, which also numbers among the nation's most tempered.<sup>374</sup>

Needless to say, the political culture and legislative dynamic of states vary. "Blue" states such as New York and Minnesota certainly cannot be said to qualify as national benchmarks (or bellwethers). Nevertheless, the palpable differences in the evolution of some state laws highlight the distinctiveness of the federal legislative process relative to registration and notification. Whether, as Dan Filler asserts, the federal process was significantly influenced by the presence of C-SPAN's national television audience, with "members of Congress seem[ing] to play to the cameras,"<sup>375</sup> or is perhaps explained by other structural factors,<sup>376</sup> is beside the point. The modus operandi of Congress over the twelve year period (1994–2006) in which federal registration and community notification policy has evolved shows a decided path-dependence, consistent with what William Stuntz has termed its unique "pathology."<sup>377</sup> The trouble is, with the federal government as the central planner, policy resulting from this pathology is imposed on the nation as a whole, rather than being undertaken as an "experiment[]" without risk to

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<sup>371</sup> See Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1292–93 (2003).

<sup>372</sup> *Id.* at 1293.

<sup>373</sup> *Id.* at 1296–1321.

<sup>374</sup> See Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 333–46 (2001).

<sup>375</sup> See *id.* at 361.

<sup>376</sup> In New York, for instance, the state's legislative structure was more conducive to concentrated critical consideration of bills because they came before legislators on single days, unlike the more diffused approach of Congress which "took the form of speeches, rather than focused debate, allowing easy avoidance of complex issues and questions." *Id.* at 361–62.

<sup>377</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

the rest of the country,” as Justice Brandeis suggested,<sup>378</sup> and James Madison envisioned.<sup>379</sup>

### B. Floors, Ceilings, Uniform Laws?

Presuming, however, federal determination to intervene, a final question must be addressed: Should the policy assume the form of a floor, prescribing only minimum requirements for states; a hybrid floor-ceiling approach, containing both minima and limits on what states can do; or a uniform set of requirements, which states must adopt without variation or customization? The question has been considered in other contexts, such as environmental regulation,<sup>380</sup> with the federal government historically inclined first to set “floors” based on worries over undue state proclivity for laxness,<sup>381</sup> and more recently “ceilings,” prompted by concerns over states being too onerous.<sup>382</sup> Because the federal government has customarily refrained from imposing criminal justice policy on the states as a whole, however, the issue remains an important and largely unexplored one warranting at least preliminary attention here.

With floors, the federal government identifies a set of minimum requirements that states must adopt, yet which states can augment. This of course has been the federal *modus operandi* with registration and notification policy since the Wetterling Act. While the minima themselves are problematic from a federalism perspective, for reasons discussed earlier, the use of a floor enjoys some benefit. Presuming that the federal floor itself constitutes sound policy (a big qualifier here), use of a floor preserves for states some freedom to customize. As a result,

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<sup>378</sup> *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

<sup>379</sup> According to Madison, who of course wrote in a time when exercise of federal police power was meager, federalism was created with the potentiality of mitigating such extremism among states. Rather than nullifying such laws, the governing arrangement permitted them to be cabined in their place of origin:

The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States . . . . A rage for paper money, for an abolition of debts . . . or for any other improper or wicked project, will be less apt to pervade the whole body of the Union . . . therefore, we behold a republican remedy for the diseases most incident to republican government.

THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

<sup>380</sup> See, e.g., William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007).

<sup>381</sup> See, e.g., Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67, 99–104 (1996) (discussing public choice reasons for why states will enact under-protective environmental laws).

<sup>382</sup> Buzbee, *supra* note 380, at 1568–76 (citing recent federal concern over efforts of certain states to impose more stringent regulations than other states).

interests of state autonomy, decentralization, and possible experimentation are preserved to some degree.

These benefits, however, are qualified. With a floor, as discussed, the specter of a “patchwork” of state laws exists, creating the risk that residents of states with more stringent requirements will be comparatively better off. Moreover, creation of a federal floor merely serves to facilitate the natural evolutionary accretion noted above, with the pathological federal regime merely augmented by that of individual states. State legislators, themselves in the C-SPAN audience,<sup>383</sup> and acutely aware of the political salience of toughened registration requirements, have quite willingly embraced the opportunity, enacting provisions with impressive speed. A floor thus obliges states to “level-up” to federal standards, and in the current politically fertile atmosphere, affords a basis for the one-way ratchet so common to criminal justice to operate,<sup>384</sup> with provisions getting tougher by the year, backed by overwhelming political support.<sup>385</sup>

What then of a floor-ceiling hybrid? On first impression, such an approach is hard to envisage. Unlike ceilings in environmental regulations, now enjoying increasing federal favor, where there is a tangible and often specific benchmark, such as with pollution emission rates, registration and notification do not lend themselves to maximum standards. However, the AWA does contain a discrete provision that can be taken as a ceiling, assuming the form of mandatory exclusions from public dissemination on state web site registries (e.g., registrants’ social security numbers).<sup>386</sup> Although the myriad matters possibly pertaining to registration and community notification make ceilings difficult, they would in theory be possible. Congress could, if it wished, for instance, expressly bar registration of juveniles altogether or adults convicted of non-physical sexual misconduct (e.g., indecent exposure or possession of pornography). Such limits, however, would have to be mandatory not optional, and coming as they would from the federal policy-making environment described above, should be expected

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<sup>383</sup> Filler, *supra* note 374, at 324 n.60.

<sup>384</sup> Ironically, just such a concern was voiced by Senator Joseph Biden (D-DE), a co-sponsor of the AWA, who in floor debates condemned Aimee’s Law, enacted in 2000, which allowed a state to recoup costs associated with the prosecution and punishment of an individual convicted of serious crimes when such individual was previously convicted of a similar crime in another state, and the latter state did not incarcerate the individual to the extent deemed appropriate by the federal government. 42 U.S.C. § 13713 (2000). According to Senator Biden, the law would “promote a ‘race to the top,’ as states feel compelled to ratchet up their sentences—not necessarily because they view such a shift as desirable public policy—but in order to avoid losing crucial federal law enforcement funds.” 146 CONG. REC. 22106 (2000).

<sup>385</sup> Here, one sees another telling contrast between environmental and criminal justice policy. In the former, many states have enacted statutes that bar state regulators from imposing standards more stringent than the applicable federal floor. See Jerome M. Organ, *Limitation on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373, 1376–86 (1995).

<sup>386</sup> See 42 U.S.C. § 16918(b)-(c) (2006).

to be few in number. Also, under current political conditions the creation of a federal ceiling will naturally serve to inspire states to satisfy that benchmark (e.g., imposing a duration cap on community notification), leading to possible sub-optimal outcomes.

Finally, consideration must be afforded a uniform rule. Just as uniformity of results is often regarded as preferable in the federal criminal justice system, ensuring consistency of results nationwide,<sup>387</sup> so too does it have advantages with respect to state registration and notification policy, at least in theory.<sup>388</sup> The “patchwork” of laws concerning Congress would be eliminated: residents would receive the same protections, and the systemic inefficiencies bred by varied state laws, prompted especially when registrants change state residence (or live, work and attend school in different jurisdictions), would be avoided. Indeed, registrants themselves would be deprived of any incentive they might have to migrate in search of a less onerous regime, leading to greater stability of the registrant sub-population and fewer challenges for state authorities charged with updating and verifying registrants’ information.

These potential benefits, however, must be balanced against the detriments of uniformity. Uniformity has clear negative implications for the cluster of federalism interests discussed earlier. With uniformity, as William Buzbee has written, there is imposed on states a “final, unitary federal choice.”<sup>389</sup> This outcome becomes especially problematic when its constituent parts, the rules that apply to the states, are predicated on incomplete or unfounded knowledge, and result from an impaired process, as has been the case with registration and notification.

These fundamental concerns, however, do not exhaust the pitfalls of uniformity. With criminal justice, as with national environmental policy,<sup>390</sup> efforts to impose uniform rules risk creation of a mere false appearance of uniformity. Substantive criminal laws and punishments,<sup>391</sup> especially relative to sexual

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<sup>387</sup> Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65 (2006).

<sup>388</sup> On the perceived benefits of uniform state laws more generally, see Larry E. Ribstein & Bruce Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138–40 (1996).

<sup>389</sup> Buzbee, *supra* note 380, at 1619.

<sup>390</sup> See James E. Krier, *On the Typology of Uniform Environmental Standards in a Federal System—and Why It Matters*, 54 MD. L. REV. 1226, 1237 (1995) (noting that “the federal uniform environmental quality standards have failed (and probably always will fail) to achieve uniform environmental quality across all the states.”).

<sup>391</sup> See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 987 (1991) (noting the “enormous variation” in state penalties); *Welsh v. Wisconsin*, 466 U.S. 740, 755 n.14 (1984) (“the classification of state crimes differs widely among the States . . . .”); *Rochin v. California*, 342 U.S. 165, 168 (1952) (“crimes in the United States are what the laws of the individual States make them . . .”).

misconduct,<sup>392</sup> show considerable variation among the states. A uniform rule only serves to paper over this diversity.

The AWA's centerpiece tier-based classification system, for instance, is pegged to the normative punishment decisions of individual states, requiring that tier classifications turn on whether convictions are "punishable by imprisonment for more than 1 year."<sup>393</sup> An "individual convicted of a sex offense" that warrants less than one year punishment under state law receives a tier I classification.<sup>394</sup> Tiers II and III are reserved for state convictions punishable for more than one year and involve offenses substantively "comparable to or more severe than" specified federal offenses.<sup>395</sup> Variations thus inevitably arise based on differences in state criminal laws and punishments. The consequences of these differences are significant, determining where an individual is placed within tiers I through III, with the outcome driving (i) the duration of registration (and hence community notification via the Internet), with tier I warranting 15 years, tier II 25 years, and tier III life; (ii) the frequency of required in-person verification, with tier I requiring annual, tier II semi-annual, and tier III quarterly; and (iii) whether the registrant's information can be exempted from public disclosure (reserved for tier I, under certain circumstances).

Ultimately, the federal government should impose nationwide criminal justice policy with great caution, if at all. Consistent with what David Super has called the "leadership model" of fiscal federalism,<sup>396</sup> the federal role can be, as it was in earlier decades,<sup>397</sup> and on occasion is still so today,<sup>398</sup> engaged in a constructive experimentalist partnership with states based on incentivizing "carrots" not coercive "sticks." Part of this relationship can be the development of model laws, regarded as John Dewey would have it, "as working hypotheses, not as programs to be rigidly adhered to and executed."<sup>399</sup> Indeed, such an approach was suggested in the omnibus 1994 legislation containing the Wetterling Act, which entailed a provision directing the attorney general to evaluate state juvenile handgun laws to

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<sup>392</sup> See, e.g., RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 2, 44–46 (1996) (surveying variations and referring to the laws as a "crazy quilt").

<sup>393</sup> 42 U.S.C. § 16911(2)-(4) (2006).

<sup>394</sup> *Id.* § 16911(2).

<sup>395</sup> *Id.* § 16911(3)-(4).

<sup>396</sup> David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2577 (2005).

<sup>397</sup> See *supra* notes 14–47 and accompanying text.

<sup>398</sup> See, e.g., Note, *Cooking Up Solutions to a Cooked Up Menace: Responses to Methamphetamine in a Federal System*, 119 HARV. L. REV. 2508, 2516–19 (2006) (noting that with respect to the effort to combat the methamphetamine problem, the United States has been deferential to states and provided technical and fiscal support in the nature of incentives consistent with federal will).

<sup>399</sup> JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 202–03 (1927). Cf. *United States v. Lopez*, 514 U.S. 549, 581 (1995) ("the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

develop model legislation, and to disseminate the study's findings to the states.<sup>400</sup> With a model law, a process can occur that is akin to the "efficient sorting" Larry Ribstein and Bruce Kobayashi observed with civil laws drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL).<sup>401</sup>

In sum, much as in decades before, when the federal government was far less willing to dictate criminal justice policy to the states, individual states, attracted to the approach advocated, can adopt and modify it as they see fit, and ideally through an evolutionary process, superior policy results ultimately can be achieved. In this way, the federal role can be like that of the American Law Institute in the creation of the Model Penal Code. The Code, as Herbert Wechsler said, was created not to "achieve uniformity in penal law throughout the nation," but rather to serve as a model to "stimulate and facilitate the systematic re-examination of the subject."<sup>402</sup>

## V. CONCLUSION

Federal concern over the perceived national menace of crime is of course not new.<sup>403</sup> What is new, however, is the federal government's resolve to impose a national solution and the lack of any meaningful countervailing resistance to it.<sup>404</sup> Just as the U.S. has increasingly moved to nationalize and render more uniform heretofore disparate state approaches to commercial law, such as products liability, and environmental policy, it has done so with criminal justice policy—in particular that relating to sex offender registration and community notification. That the shift

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<sup>400</sup> See Pub. L. No. 103-322, 108 Stat. 1796, 2012 (1994) (codified at 42 U.S.C. § 5653). The AWA itself authorizes grants to states for the purposes of "establishing, enhancing, or operating" involuntary civil commitment regimes for "sexually dangerous persons," when such programs are "consistent with guidelines issued by the Attorney General." 42 U.S.C. § 16971 (2006). Why Congress adopted this approach with involuntary commitments is unclear. However, the enormous cost associated with maintaining commitment regimes, which itself has served as the major impediment to its greater usage in states, doubtless played a role. See Janus & Logan, *supra* note 354. While Congress has been willing to impose on the states unfunded mandates to the degree associated with registration and community notification, the consequences of civil commitment appear to exceed that level of willingness.

<sup>401</sup> Ribstein & Kobayashi, *supra* note 388, at 133.

<sup>402</sup> Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1427 (1968).

<sup>403</sup> See, e.g., RICHARD M. BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 3–36 (quoting Abraham Lincoln's concern voiced in 1837 over the "increasing disregard for law which pervades the country . . .").

<sup>404</sup> Symptomatic of this shift, almost fifty years before the AWA codified federal authority to prosecute emigrant sex offenders, Congress briefly entertained a very similar provision. In 1960, Representative John A. Lafore, Jr. (R-PA) introduced a bill "[t]o provide that known sex offenders who travel in interstate commerce shall register as prescribed by the Attorney General." If an eligible individual did not register within seven days of "entry into any federal district," the individual faced a \$1,000 fine, a year in prison, or both. H.R. 11,652, 86<sup>th</sup> Cong. (1960) (introduced Apr. 7, 1960). The bill died in committee while the AWA's criminal provision won overwhelming endorsement.



has occurred via federal use of the “Trojan horse”<sup>405</sup> of conditional spending power authority, rather than through the more controversial method of Commerce Clause authority, does not alter the outcome. The nationalization of registration and notification, systematically achieved by the federal government over a fifteen-year period, has had major effect on constitutional federalism and the states themselves. It may be that the unique social and political dynamic inspired by sex offenders is unique,<sup>406</sup> limiting the broader implications of the story chronicled here. However, given the high political salience and potency of crime control more generally, and the disdain felt for criminal offenders, this might well not be the case. If indeed the essence of federalism lies, as William Livingston asserted over fifty years ago, “not in the institutional or constitutional structure but in [the attitudes of] society itself”<sup>407</sup> then the transformation recounted here may well have broader implications for other criminal justice policy areas in the years to come.

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<sup>405</sup> See Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85.

<sup>406</sup> This uniqueness is perhaps reflected in comparison to federal efforts to promote determinate sentencing among states with the Truth-in-Sentencing law. See Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701-13709 (1994)). With the TIS, enacted as part of the same omnibus 1994 law containing the Wetterling Act, Congress tied federal grants for prison construction to states enacting laws requiring that their violent offenders serve at least eighty-five percent of the sentences imposed upon them. In contrast to the sustained effort mounted with registration and notification, and despite the popularity of a toughened stance on violent offenders, federal (and state) interest waned, and the program was discontinued. See Susan Turner et al., *An Evaluation of the Federal Government's Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants*, 86 PRISON J. 364 (2006). Similarly, “Aimee’s Law,” a 2000 law intended by Congress to ensure longer terms for offenders by requiring that states in effect reimburse one another for costs associated with convicts that they prematurely release and recidivate in another state, was never fully implemented. See *supra* note 212.

<sup>407</sup> William S. Livingston, *A Note on the Nature of Federalism*, 67 POL. SCI. QTLY. 81, 84 (1952). See also DANIEL J. ELAZAR, *EXPLORING FEDERALISM* (1987) (federalism “is a way of thinking”).